Stanton Industries, Inc. d/b/a Stanton Industries of California *and* International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO. Cases 32–CA–12695, 32–CA–12706, 32–CA–12881, and 32–RC–3597

February 28, 1994

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND TRUESDALE

On August 10, 1993, Administrative Law Judge Timothy D. Nelson issued the attached decision. The General Counsel filed exceptions[1] and a supporting brief and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, as modified, and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the consolidated complaint is dismissed in its entirety and that the objections to the representation election in Case 32–RC–3597 are overruled, and certifies that International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO did not receive a majority of the valid ballots cast in the election.

[1] No exceptions were filed to the following portions of the judge's decision: sec. II,A; sec. III,A; sec. III,C,3; sec. III,D; sec. III,E; and sec. III,F.

[2] In adopting the judge's finding that the Respondent did not violate Sec. 8(a)(1) or interfere with the election by changing its system for distributing paychecks in early October 1992, we do not rely on the judge's finding that the change was too minimal a benefit to coerce employees or interfere with the election. Instead, we rely solely on the judge's finding that the timing of the change was attributable to the appointment of a new plant manager in early October 1992 who preferred the revised system and to General Manager Anderson's acquiescence to the new plant manager's preference for the revised paycheck distribution system. As the Respondent has established a legitimate reason for the timing of the change that is unrelated to the exercise of Sec. 7 rights or to the election, the change was permissible. See generally *Montgomery Ward & Co*., 288 NLRB 126, 127 fn. 6 (1988); *Speco Corp*., 298 NLRB 439 fn. 2 (1990).

Jo Ellen Marcotte, Esq., for the General Counsel.

Arthur T. Carter and *Steven G. Biddle, Esqs. (O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears),* P.A., of Phoenix, Arizona, for Respondent Stanton Industries.

Ed Warshauer, Business Representative, of Berkeley, California, for Charging Party Petitioner IUE.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. I heard these consolidated unfair labor practice and representation cases in 4 days of trial proceedings held in Stockton, California, on March 2–5, 1993. The cases commonly involve attacks on the behavior of the Respondent, Stanton,[1] during an organizing drive and preelection campaign conducted August through October 1992[2] by the Petitioner Charging Party, the IUE,[3] among Stanton's production and maintenance employees at its furniture plant in Stockton.

The IUE filed its petition for representation election on August 21, and on October 30, agents of the Regional Director for Region 32 held a secret ballot election at the Stockton plant, where the IUE got only about one-third of the 204 valid votes cast.[4] The IUE filed objections to the election; it asks the Board to set aside the election results, based on certain unfair labor practices allegedly committed by Stanton in the ''critical period'' between the August 21 petition filing and the October 30 election.[5]

The IUE filed its first unfair labor practice charge on August 17, in Case 32–CA–12695; it filed a separate charge in Case 32–CA–12706 on August 24; and it filed an amended charge in that latter case on October 16. On October 21, after investigating, the Regional Director for Region 32 issued a consolidated complaint in those cases, alleging that on various dates in August, agents of Stanton made statements to employees which violated Section 8(a)(1) of the Act. All but two of these counts referred to incidents occurring before the petition was filed by the IUE on August 21.[6] In addition, this consolidated complaint alleged that Stanton violated Section 8(a)(1) and (3) of the Act on August 17, when it ''indefinitely suspended'' an ''employee'' named Ry Ou, and ''since that date . . . failed and refused . . . to reinstate him to his former position[,]'' all because of Ou's activities and support for the IUE.

On December 10 the IUE filed another charge, separately docketed as Case 32–CA–12881, and the Regional Director issued a separate complaint in that case on January 29, 1993. In this complaint the Regional Director alleged that Stanton's agents committed additional violations of Section 8(a)(1) in the months of September and October, before the election.

[1] Stanton Industries, Inc. d/b/a Stanton Industries of California.

[2] All dates below are in 1992 unless I specify otherwise.

[3] International Union of Electronic, Electrical, Salaried, Machine, and Furniture Workers, AFL–CIO.

[4] The IUE's August 21 petition was docketed as Case 32–RC–3597. The IUE and Stanton later signed a Stipulated Election Agreement, which the Regional Director approved on September 16. The October 30 tally of ballots shows that the IUE received 69 valid votes, while 135 other valid votes were cast against the IUE. Two other ballots were held to be void, and four additional ballots were cast under challenge, but were nondeterminative, and the challenges were not resolved.

[5] As I elaborate below, the ultimate consolidated amended complaint charges Stanton with having committed 8(a)(1) violations in this critical period, and also with having violated Sec. 8(a)(1) and (3) in the days before the IUE filed the petition.

[6] The exceptional counts were based on an incident on August 24, during which an agent of Stanton allegedly ''verbally promulgated'' and ''threatened to enforce'' an ''overbroad no-solicitation rule,'' and moreover, ''selectively and disparately enforced'' that rule.

On February 11, 1993, the Regional Director issued his ultimate pretrial pleading in the unfair labor practice cases, an ''Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing'' (the complaint). There, he ordered that the allegations of the consolidated complaint issued in Cases 32–CA–12695 and 32–CA–12706 be consolidated for purposes of trial with the allegations in the separate complaint issued in Case 32–CA–12881, and he realleged all previous alleged violations in a single, integrated document. In addition, he alleged for the first time that Stanton had unlawfully granted wage and incentive pay increases on August 24.[7]

At the trial's outset on March 2, 1993, counsel for the General Counsel further amended the complaint to delete one count (par. 6(i)(1), alleging that on August 24, Stanton ''verbally promulgated an overbroad no-solicitation rule''), and to trim the claims made in another count (par. 6(g)) concerning Stanton's degree of responsibility for an employee-drafted antiunion flyer.

The IUE had originally filed eight distinct postelection objections, but later withdrew two of them. On February 14, 1993, the Regional Director issued a ''Report and Recommendations on Objections, and Order Consolidating Cases, and Notice of Hearing,'' in which he ordered that the representation case objections likewise be consolidated for common hearing with the consolidated unfair labor practice case allegations. The Regional Director noted in this regard that,

> The matters alleged in [the six outstanding objections to the election] are substantially similar to conduct alleged to constitute unfair labor practices in the complaints [sic] which issued in Case 32–CA–12881 and the allegations concerning the no-solicitation rule which issued in Case 32–CA–12706 [sic].[8]

Stanton's various answers admit, and I find, that it is an Oregon corporation which owns and operates furniture plants in several States, including in Stockton, and that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.[9] Stanton denies that it did anything unlawful or objectionable; in addition, its answers to the complaints, and its filings in the representation case raise specific affirmative defenses, including these, most notably:

> (a) Ry Ou was a ''supervisor within the meaning of Section 2(11) of the Act''; he did not enjoy the protections the Act extends to ''employees.'' Therefore, Stanton committed no unfair labor practice by admittedly suspending him indefinitely for refusing to stop his IUE activities.[10]
>
> (b) Any misconduct Stanton may be found to have committed before the petition-filing on August 21 cannot be invoked to justify setting aside the election.[11]
>
> (c) Stanton effectively ''disavowed'' certain alleged statements made by supervisor Phanvongsa on August 19, and therefore, counts in the complaint associated with the disavowed conduct may be dismissed without reaching the merits.

I have studied the whole record,[12] including the posttrial briefs submitted by the General Counsel and counsel for Stanton, and the legal authorities they have cited. Upon that study, and upon my credibility assessments of the witnesses as they testified, and my sense of the inherent probabilities, I make these

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[7] The IUE's December 10 charge in Case 32–CA–12881 had alleged, inter alia, that Stanton had unlawfully ''increas[ed] base wages and attendance incentive pay.'' For reasons which are not clear, the complaint that issued on January 29, 1993, pursuant to that charge did not challenge these pay increases.

[8] The Regional Director inadvertently stated that ''complaints'' had issued in Case 32–CA–12881, and likewise inadvertently implied that the ''allegations'' concerning the ''no-solicitation rule'' were associated with a single complaint, in Case 32–CA–12706. In fact, however, only one complaint issued in Case 32–CA–12881 (it attacked postpetition conduct by Stanton in September and October), and the ''no-solicitation'' allegations (likewise attacking postpetition conduct by Stanton on August 24) were contained in a *consolidated* complaint in Cases 32–CA–12695 and 32–CA–12706. While these references are thus marginally confusing, it nevertheless appears that the Regional Director intended to certify that the IUE's outstanding objections do not attack any prepetition (i.e., pre-August 21) conduct by Stanton, but are essentially coextensive with those counts in the Regional Director's February 11, 1993 amended consolidated complaint which attack certain behavior by Stanton's agents occurring on or after August 21.

[9] Stanton admits, and I find, that in the year before February 11, 1993, it sold and shipped more than $50,000 worth of products to customers outside California.

[10] In its answer, Stanton admits that it ''indefinitely suspended'' Ou on August 17, and has since ''failed and refused to reinstate him,'' and that it did this because Ou (in Stanton's words) ''had engaged in organizing activities on behalf of [the IUE] and refused[,] following the companies [sic] request, to cease and desist from such activity.''

[11] That the IUE's objections do not rely on prepetition behavior by Stanton seems to have been implicitly acknowledged in the above-quoted passage from the Regional Director's February 14, 1993 report and recommendations on objections, etc. Moreover, under the Board's Rule in *Ideal Electric Co.*, 134 NLRB 1275 (1961), prepetition misconduct cannot normally be found to have disturbed the ''laboratory conditions'' required for the holding of an election.

[12] Regarding the trial transcript:

(1) Out of an unfortunate misunderstanding about what is required when the judge grants a motion to strike, the official court reporting service has deleted entirely from the transcript certain testimony as to which I granted motions to strike during the trial. No party has objected to this, and it therefore appears that such deletions were harmless.

(2) Within the first footnote in the General Counsel's brief is a motion to ''correct the official transcript to change the name 'Khanh Nguyen' to 'Hung Nguyen[,]''' in a large number of instances associated with the testimony and questioning of employee Lewis Garcia. As I explain elsewhere, it appears that Garcia was referring, in fact, to Department Supervisor Hung Nguyen nearly all the passages in question, even though Garcia (and, in turn, the attorneys questioning him), are reported in the transcript as having used the name Khanh Nguyen, who was the plant manager. However, in the absence of any showing that the transcript misreported the name actually used by Garcia and the attorneys in the passages in question, I deny the General Counsel's motion to ''correct'' the transcript as being, in reality, a motion to ''amend'' the transcript.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. STOCKTON PLANT OPERATIONS AND HIERARCHY

Stanton typically uses 220–250 nonsupervisory employees at Stockton to make, package, and ship upholstered furniture products, such as chairs, ottomans, sofas, and hide-a-bed sleepers. The plant is housed in one main building and a leased area within a second one. It uses a ''K-D'' (Knock-Down) production system, rather than a continuous assembly process. In a K-D system, the four main components of a furniture piece (seat, back, arms, and cushions) each undergo a separate series of fabrication steps, in different departments, before being brought to a common area for final assembly.[13]

The top manager at Stockton is General Manager Robert Anderson, also a Stanton corporate vice president, who held ultimate responsibility for all business and sales, personnel, and production matters at the plant at all times that concern us. Reporting to Anderson concerning production matters was Plant Manager Khanh Nguyen,[14] who did what his title implies until October 2, when he transferred to Stanton's Phoenix plant. At Stockton, Nguyen was assisted by Production Supervisor Agustin Gonzales.[15] Gonzales succeeded to Nguyen's former position as plant manager after Nguyen went to Phoenix.

The plant is organized into 13 distinct and well-recognized ''departments,'' each headed by a ''supervisor,'' a title which Stanton uses interchangeably with ''leadman'' (or ''leadperson'') to describe the department heads. They reported at material times to Gonzales and Nguyen. Several of the department heads are alleged in the complaint and admitted by Stanton to be statutory ''supervisors'' and ''agents'' of Stanton.[16] Ry Ou, the alleged discriminatee, who was in charge of the seat framing department, is the only department head who is claimed by the General Counsel not to be a statutory supervisor. Hereafter, I will generally use the term ''supervisor'' to describe the department heads, including when I refer to Ry Ou.[17]

II. ALLEGED PREPETITION UNFAIR LABOR PRACTICES

A. *The 8(a)(3) and (1) Counts Associated with the Indefinite Suspension of Ry Ou*

1. The General Counsel's prima facie case

Stanton admits in its answer that it ''indefinitely suspended'' Ry Ou on August 17, and has since ''failed and refused to reinstate him,'' because Ou ''engaged in organizing activities on behalf of [the IUE], and refused . . . to cease and desist from such activity.'' These are the details: On August 10, IUE delivered a letter to Stanton's offices, addressed to General Manager Anderson, saying in the opening paragraph,

> This is to advise you that the employees of Stanton Industries have formed an organizing committee to take advantage of their legal right to organize. The committee members are:
>
> | | |
> |---|---|
> | Lewis Garcia | Martha A. Pimental |
> | Maria Raya | Say Plork |
> | Vian Theang | Toem Mork |
> | Buntha Kham | Samarong Kong |
> | Heang Kim Sem | Ry Ou[18] |
> | Alonzo Tomas | |

Anderson read this letter and summoned Ou to his office on Wednesday, August 12, also bringing in Plant Manager Nguyen and Nguyen's assistant, Gonzales. There is no significant dispute between Ou and Anderson about the basic message Anderson delivered to Ou, but their respective accounts from the witness stand contain different versions of the English-language words and phrases Anderson used to express himself. Recognizing Ou's difficulties in speaking

[13] An example, drawn from a variety of record sources, will partly illustrate this: To fill a retail customer's order for 50 chairs of a certain model, departments responsible for framing components (seat framing, arm framing, and back framing) will separately and more or less simultaneously make 50 seat and back frames, and 50 pairs of arm frames. As the framing departments are doing this, the Sewing department will be preparing 50 sets of fabric coverings for the specified chair, and the cushion department will be cutting foam for cushioning on the chair seat, and perhaps its back and arms, depending on the style being run. Once put together, these basic components will be distributed to other departments for installation of further layers of padding and upholstery. (For example, completed seat frames go to the center foam and upholstery department; arm frames go to the arm padding department, then the padded arms go to a separate arm upholstery department.) The finished components are then put together in the assembly department, and the assembled chairs are then put into cartons in the packing department, and are then moved to the shipping department for dispatching to the customer.

[14] Unless I specify otherwise, all references below to ''Nguyen'' are to Khanh Nguyen. As I have already noted, the plant's supervisory complement included at material times a department supervisor named Hung Nguyen, who was apparently the person witness Garcia was referring to in certain instances. (The plant complement also includes a department supervisor named Tuyet Nguyen, who does not otherwise figure in the cases.)

[15] In some company records, Gonzales was also titled, ''Assistant Plant Manager,'' or ''Plant Supervisor.''

[16] These are, Frank Niemi, mill department; Meng Ny, cushion department; Hung Nguyen, center foam and upholstery department; Duong Pham, assembly department; and Boravanh Phanvongsa, packing department. The complaint alleges that Phanvongsa committed 8(a)(1) violations, and for reasons noted above and below, it also apparently refers to department supervisor Hung Nguyen in alleging at par. 6(e) that ''Nguyen'' was involved in unlawful ''solicitation'' of employees ''grievances.''

[17] I am mindful that ''leadman,'' the title favored by the General Counsel (but only when referring to Ou), could as easily be substituted, and often was, by Stanton, when referring to the department heads. I recognize that neither title is dispositive of the question of Ou's status. In this case I prefer ''supervisor'' not simply because that is what department heads are often called by the Company and its employees, but mainly because I will find that Ou satisfies the definition of ''supervisor'' set forth in Sec. 2(11) of the Act.

[18] Of these listed organizing committee members, only Ou was a department supervisor; the rest were conceded rank-and-filers.

English,[19] and finding Anderson overall more believable than Ou,[20] I credit Anderson's version, as follows:

> I explained to Ry Ou that . . . I needed him on our side. And I expected him to be on our side, being a supervisor. And . . . that he needs to make up [his mind] which side of the fence he wanted to be on, either the Union side of the fence, or Stanton side of the fence. And that I was going to be gone for two or three days in Oregon, for a Corporate meeting, and that I would, you know, give him them days to think it over. And talk to me Monday, when I got back to work.
>
> . . . .
>
> At that time, he didn't give me an answer, or nothing.
>
> . . . .
>
> [At some point] he told me he signed a Union card, so he could make 50 percent more money.
>
> Q. Did you ask him any questions about that statement?
>
> A. No.[21]

On Monday, August 17, Anderson returned and met with Ou. Ou told Anderson, in effect, that he was sticking with the Union. Anderson then handed Ou some kind of paper saying that Ou was ''suspended until further notice.''

2. Ou's status and its legal implications; supplemental findings and conclusions

a. *Introduction*

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer ''to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.'' Section 7 declares pertinently that ''[e]mployees shall have the right . . . to form, join and assist labor organizations[.]'' Section 8(a)(3) of the Act provides overlapping protection to employees; it makes it unlawful for an employer to ''discriminat[e] in regard to hire or tenure of employment . . . to . . . discourage membership in a labor organization.''

If Ou occupied statutory ''employee'' status, Stanton violated Section 8(a)(1) and (3) when it admittedly suspended him indefinitely[22] because he refused Anderson's implicit ultimatum to cease his activities for the Union. Likewise, if Ou was an ''employee,'' Stanton obviously committed an independent 8(a)(1) violation when Anderson issued this ultimatum.[23] But if Ou was a ''supervisor'' within the meaning of Section 2(11) of the Act, he enjoyed no statutory protection if he chose to engage in union organizing activities, and Stanton could lawfully question him about those activities, tell him to stop them, and fire him for not stopping them.[24]

Section 2(11) defines a ''supervisor'' as,

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or to responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To find that Ou is a statutory supervisor, I will not have to find that he had authority to take all of the types of personnel actions listed in Section 2(11), nor even most of them; it will be enough if I find that he had authority to take any one of them.[25] But we are also adjured by the courts ''not to construe supervisory status too broadly, for a worker who is deemed a supervisor loses his organizational rights.''[26] This concern is no mere abstraction in this case; Ou lost his job precisely because he refused to stop his par-

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[19] Ou, a native of Cambodia, has lived in the United States for at least 7 years, and appears to have no difficulty understanding ordinary forms of spoken and written American English; but he speaks it less than fluently. (A Khmer-language translator stood by during Ou's testimony, and Ou called upon him at certain junctures, particularly as he became increasingly defensive during cross-examination by Stanton's attorney.) Ou's attempts to recapitulate in English what Anderson said to him on August 12 (and later, on August 17) contained many awkward formulations, which I doubt that Anderson actually used.

[20] Language difficulties aside, Ou's answers to probing questions were often evasive, and liberally sprinkled with gratuitous and self-serving generalizations, suggesting to me that he was trying to shape his testimony to suit his personal stake in the outcome. By contrast, Anderson struck me as candid and credible in his account of this meeting, and in his accounts of other material events, as well.

[21] Ou, after concluding his own narration of the meeting without describing any ''interrogation'' by Anderson, was led by the General Counsel to recall that Anderson had at some point asked him if he had signed a union card. In a portion of his testimony not quoted above, Anderson specifically denied asking Ou whether he had signed a union card. Because Ou's contrary testimony emerged belatedly, and only after leading questioning, I doubt its reliability, and I credit Anderson that he did not so question Ou.

[22] I don't know why Stanton chose to label its action against Ou a ''suspension until further notice'' (or an ''indefinite suspension,'' as it describes the same action in its answer), rather than simply, a ''firing,'' or ''termination.'' However, I will have no difficulty using the latter terms to describe what Stanton did to Ou, especially where Stanton also admits it has continuously ''failed and refused'' to reinstate Ou since August 17.

[23] The complaint alleges both that Anderson unlawfully ''interrogated'' Ou about his union activities in their August 12 meeting and that he unlawfully ''threatened'' him. If Ou was a statutory employee, Anderson's ultimatum could easily be deemed an unlawful ''threat,'' but the complaint could not be sustained in any case as to the ''interrogation'' count, because I can find no evidence of interrogation in Anderson's credited account.

[24] *Beasley v. Food Fair of North Carolina*, 416 U.S. 653, 654–655 (1974); *Florida Power Co. v. Electrical Workers Local 641*, 417 U.S. 790, 808 (1974); *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), petition for review denied sub nom. *Automobile Salesmen's Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983). See also, e.g., *Gino Morena Enterprises*, 287 NLRB 1327 (1988).

[25] *NLRB v. Yeshiva University*, 444 U.S. 672, 682 fn. 13 (1980). See also *Butler-Johnson Corp. v. NLRB*, 608 F.2d 1303, 1306 fn. 4 (9th Cir. 1979):

> The enumerated functions of Section 2(11) are to be read in the disjunctive, and the existence of any of them, regardless of the frequency of their performance, is sufficient to confer supervisory status.

[26] *McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932, 936 (9th Cir. 1981), citing *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970), cert. denied 400 U.S. 831 (1970).

ticipation, with employees, in a union organizing effort. Therefore his status deserves careful scrutiny.

I will conclude that Ou was a statutory supervisor because of the following features of his position, features which are generally shared by all department supervisors in the Stockton plant, and features which had been associated with the job of department supervisor well before the IUE ever appeared on the scene:

(1) Stanton held Ou out to the employees in seat framing as the man who ''run[s] the department,'' whom they should ''respect,'' and whose ''orders'' they must ''follow.''

(2) Ou was empowered to, and did, back up his orders and otherwise enforced company policy by issuing written disciplinary warnings to seat framing workers, which went into their personnel files.

(3) When periodic cutbacks in the work force were decided on at higher levels, Ou was asked to make ranking judgments about the workers in his department, determining who would stay and who would go.

(4) Stanton underscored Ou's managerial status in other distinct ways: it paid him a substantially higher hourly rate than anyone else in his department; it issued his pay check on the day the other supervisors and managers got paid, not on the rank-and-file payday; and it included him in company bonuses available only to supervisors and higher managers.

(5) Ou was formally and in fact ''responsible'' for the quality and timeliness of the work done by the 14 employees in his distinct (and physically remote) department, and no one else, above or below him, was formally or in fact charged with that central responsibility, or shared significantly in it.

(6) The several types of jobs performed in seat framing cannot be dismissed as being merely ''routine'' or ''repetitive'' in character, because the plant makes a large variety of types and styles of furniture, each with its own unique dimensional and structural requirements, and because production departments like seat framing are required several times each week to switch from making one type or style to another.

(7) For related reasons, Ou's supervisory role involved many ''nonroutine'' features; to satisfy orders and coordinated manufacturing schedules for a variety of furniture types, Ou was required to use judgment and discretion in anticipating, directing, and otherwise ''managing'' the work flow in his department, including by assigning or reassigning seat framing workers from one task to another, and on occasion by ''borrowing'' workers from other departments or ''loaning'' his own workers to another department supervisor.

From my study of the General Counsel's brief, it appears that the prosecution would not seriously contest my summary findings in items (1) and (4), above, and I will not dwell on those points in my more detailed findings below. But relying almost entirely on Ou's testimony, the General Counsel would seek to explain away the facts summarized in items (2) and (3), and would challenge my finding in item (5) that no one else shared substantially in Ou's responsibility for the work done in his department, and would also resist the ''nonroutine'' characterizations I made in items (6) and (7). I will return to these contested points as and after I lay out certain details which Ou either admits or does not specifically dispute.

b. *Seat framing operations*

Every type or style of furniture Stanton makes at Stockton needs a seat, and Ou's former department, the only one located outside the main plant building, makes the frames for them. Typically, 14 employees worked under Ou. (Most of the 13 departments use between 10 and 20 nonsupervisory workers, but one—sewing—employs 59, while another—packing—has only 6.)[27] One seat framing worker operates a pneumatic-drive ''clip,'' trimming lumber, plywood, or composition board to dimensions required for the pieces used in the particular style being run. One more employee does ''load-up,'' stacking and moving the clipped pieces to the four ''framers,'' who use pneumatic staplers and glue guns to attach the pieces and to install reinforcing corner blocks.[28] Four other ''spring-up'' workers affix springs to the framers' product; three more ''foam-up'' workers add foam and cardboard elements. Completed seat frames are then loaded onto a cart or forklift by department workers, and transported to another department, center foam and upholstery, where upholstered cushions are attached to the seat frame.

Stanton makes a large variety of types or styles of furniture at Stockton. (Ou said at one point, ''we have hundred style . . . there that we have to remember.'') Each type and style has some unique dimensional or assembly feature, and department output may vary substantially, depending on the complexity of the clipping and assembly required for each type.[29] And if the production schedule requires it, as it does, many times each week, Seat Framing, like other production departments, must be prepared within the course of a single shift to switch without significant interruption from making frames for one style to making frames for another.[30]

c. *Ou's prior experience under other seat framing supervisors*

Ou started at the plant in 1985, and worked exclusively in seat framing thereafter. When he started, the Company gave him a plant rules pamphlet, which he signed, acknowledging that he had read them. ''General Rule'' 3 in the rules pam-

[27] I recall that Phanvongsa, the supervisor of these six packing workers, is alleged by the General Counsel to be a statutory supervisor whose alleged statements to employee Lewis Garcia (infra) implicated Stanton in 8(a)(1) violations. Except for the fact that Phanvongsa supervises only 6 workers, while Ou supervises 14, I can find nothing in the record which distinguishes Phanvongsa from Ou in terms of responsibility, status, or power.

[28] On some furniture styles, the framers also use a stretching machine as part of the process of affixing a mesh covering on the frame.

[29] Thus,

> Q. MS. MARCOTTE: And about how many pieces of furniture come through the department each day?
>
> A. MR. OU: It depend how hard style it is. Some hard style coming it take too much time. Like example, Dimatrol use cover that pull by machine. That won't take more than ten minutes. So we run about 250 or 280 per day. Because that style very hard. So we cannot run more than 300 unless we have more people come to help. If the easy style coming up we run about 500 piece a day.

[30] Thus, Ou admits that framers and spring-up workers may be finishing work on one style even as the clip operator has begun trimming structural pieces for frames for a different style.

phlet instructed employees to ''Follow Orders of Leadman Supervisors.''[31]

Ou was trained first in spring-up work by his then-supervisor, Frank Niemi. Later, Niemi trained Ou in framing. The framer's job is apparently the most skilled and demanding one in the department, and according to Ou, it requires the most careful training and close, ongoing supervision.[32] Niemi made Ou a framer after judging that Ou was ''ready'' for that work.[33] About a year later, Niemi became the mill department supervisor, and was replaced as seat framing supervisor by Rodney Trishell. In early 1987, Trishell shifted to the position of Back Framing supervisor, and was himself replaced as seat framing supervisor by Ou, as described next.

d. *Ou's promotion to supervisor*

Ou was summoned to the executive offices sometime in early 1987. There, he was greeted by Anderson, Nguyen, and Gonzales, who told him that he would be taking over the department from Trishell. As Ou recalled it, the managers offered their ''congratulations,'' and told Ou that he was a ''good man,'' and that he would be ''responsible for that department''; and they informed him that he would now get a $1-an-hour raise, from $8.73 to $9.73.[34] Ou also recalled that the managers presented him with a ''bonus check,'' signaling that he was now eligible to participate in the Company's quarterly profit-sharing bonus plan—a plan which only department supervisors and their managerial superiors shared in.[35] Finally, Ou reported that when these ceremonies were completed with handshakes, Nguyen and Gonzales escorted Ou back to the seat framing department, where they introduced him to the workers as the man who was going to ''run the department,'' and whom they must ''respect.''

e. *Ou's basic responsibilities*

The record shows without contradiction that Ou's most central responsibility, like that of other production department supervisors, was to ensure that workers in his department produced a certain number of units of certain varying types, according to a certain sequence and schedule set forth on ''lay sheets,''[36] which the Company sent out to the department supervisors several times each week. Ou also had to make sure that workers were doing their jobs safely,[37] and

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[31] In addition, the ''Safety'' section of the plant rules instructed employees, inter alia, to ''Report unsafe acts or conditions to your supervisor.'' And the ''Medical'' section of the Plant Rules stated, inter alia,

> (1) Employee must notify supervisor of doctor appointments at least one day in advance. The next working day following the doctor's appointment, employee must give department supervisor a note from the doctor.
>
> (2) Employees that are injured on the job and fail to report the injury until they are absent, must provide supervisor with details of the injury and the name of the treating doctor. [Remaining text omitted.]

[32] For example (my emphasis):

> Q. MS. MARCOTTE: How long does it take to learn how to do the framer job?
>
> A. MR. OU: Framer all day. [*] Framer very hard and dangerous because you hold about a big lumber here. And you have to hold close right here. If you hold close, when you pull a—when you pull together because you step on a side already. When you put together this is going to be hard. And you got to hold on real tight. If you say like this staple miss, going to hurt your hand. That's not safe. *So I got to be right there train them all the time.*
>
> [*] Incidentally, unlike the General Counsel, I do not accept any attempt by Ou here to leave the impression that an untrained person can learn all there is to know of the framer's job in ''one day.'' Not only does Ou's testimony before and after he made this claim make it dubious, [**] but it is inherently improbable, given the variety of furniture dimensions and techniques involved, that someone could learn how to make frames for all those types in ''one day.'' I think Ou's testimony here is best understood as his estimate of how long it takes a person already familiar with the department to be trained in *basic* framing techniques and tool-handling.
>
> [**] For example, asked by the General Counsel how long it would take a clip operator to learn the job, Ou answered:
>
> All day. Sometime half a week, they understand. But they understand just some style. But we have hundred style right there that we have to remember. Sometime take the whole week to remember.

[33] Thus:

> Q. JUDGE NELSON: How did you come to change to be a framer?
>
> A. MR. OU: Because they know that I know all the spring-up. I know what kind of style. Put spring, what style need spring to go. I know all that. And then they said—
>
> Q. Who is they?
>
> A. My supervisor. I mean, my lead person.
>
> Q. Frank [Niemi].
>
> A. Frank, yes.
>
> Q. So Frank sees that you know how to do one thing.
>
> A. Yes.
>
> Q. Then he says—
>
> A. They train me how to—
>
> Q. And he says now you can do framing.
>
> A. Right.
>
> Q. You're ready for framing.
>
> A. Yes.

[34] Before getting this raise, Ou was being paid at the top (i.e., ''Unlimited'') rate available to rank-and-file workers in the department. Moreover, after his promotion, Ou began to receive his paycheck on Thursday, when other supervisors and managers got paid, while the rank-and-file workers continued to receive them on Fridays.

[35] Crediting Stanton's personnel and safety manager, Pam Zurilgen, the Company also includes department supervisors in an ''end-of-year,'' or ''Christmas'' bonus given to management-level personnel, but not to rank-and-file workers.

[36] These are complex, multipage lists of the pending orders for various furniture units, described by product code numbers denoting type and style. They prescribe the sequence to be followed by each department in making up its quota of components for each type. It was not shown that anyone in the department besides Ou was able to decipher and make sense of these lists, or that anyone else in the department was thoroughly familiar, as Ou was, with all the subtleties of fabrication and assembly associated with each of the ''hundred styles'' which might be listed by code numbers on the lay sheets.

[37] Ou had distinct responsibilities in carrying out Stanton's plant safety and accident prevention program; he attended meetings with other managers and department heads relating to this program, and he was required to complete and sign, as ''supervisor,'' certain injury report forms when someone in his department was injured. In this regard, I do not find that it detracts from Ou's personal responsibilities for enforcing and implementing the safety program that Ou, as he says, may have gotten guidance from personnel manager Zurilgen in how to fill out and complete the injury report forms. It does not make a statutory supervisor less so that he or she may re-

Continued

that the work they were doing conformed to design specifications, i.e., that each frame had been properly assembled and prepared for the next stage of work before leaving the department. Associated with his responsibilities to get seat frames safely and properly made and out on time, Ou was the person charged with ensuring that necessary materials were always on hand, a responsibility which he could discharge only by referring regularly to the lay sheets and comparing current department inventories against current and projected output. As I elaborate below, when he was fulfilling these responsibilities, Ou seems to have been making often subtle judgments affecting workflow, assignments, and work progress, judgments which no one else was expected to make, or practically could make.

f. *Ou's normal range of daily activities*

Ou started each day by compiling the previous day's production output figures for each of the workers in his department, and then taking these records to Gonzales or Nguyen. His worksite for these and other purposes was a podium desk, incorporating locked cabinet compartments below.[38] After turning over the employee production figures, Ou would assess his materials inventories and production status in the light of the demands set forth on the lay sheets, and would determine what amounts and types and dimensions of materials his department would need to stay abreast, and would call the mill department with an order for such materials. He would then go to the mill department to retrieve the order,[39] making sure that the forklift driver loaded the right materials. When he was back in his department, Ou was admittedly kept busy monitoring and assessing current department output and materials needs,[40] overseeing the progress and quality of the work being done by 14 employees, telling employees to make corrections when he discovered assembly flaws,[41] and instructing or correcting employees in the performance of unfamiliar elements of work.[42] Less frequently, apparently, Ou might find it necessary to call workers together to exhort them to speed up.[43]

I presume from the foregoing that Ou could not have been expected to perform production work himself on a regular basis. Nevertheless, testifying in generalizations, Ou stated that he occasionally would pitch-in on a task, if he had no one else available, and if one of the employees was ''behind'' in the production schedule. That Ou may have had the discretionary power to assign himself to the performance of bargaining unit tasks is hardly inconsistent with the powers of a statutory supervisor; indeed, on the other side of this coin is a portrait of someone with power to unassign himself from the performance of bargaining unit work as he saw fit. And this alone clearly distinguished Ou from the rest of the workers in his department, who enjoyed no such discretion. In any case, there is no evidence that Ou performed such pitch-in tasks on a regular basis, much less that he spent a substantial amount of his workday performing such tasks.

g. *Ou's ''authority''*

As I have found, in seat framing, as in other production departments, Stanton relies centrally on the department supervisor to make sure that components are made correctly

quire guidance from above in discharging certain supervisory functions; it seems more important for these purposes that Ou, like all department supervisors, is institutionally charged with these responsibilities, and admittedly trains and monitors workers in the department with these responsibilities in mind.

[38] On the desk Ou kept paperwork associated with current production. In the locked cabinet of the desk he kept employee production records, and blank forms, including forms used generally by department supervisors to record disciplinary reprimands and other disciplinary action. Also in these compartments, or in adjacent locked cabinets, Ou kept power tools, such as stapling and glue guns, and supplies and replacement parts. Only Ou had the keys to these cabinets, and he was the one to issue these tools, supplies, and parts at the start of the workshift, and to retrieve and secure them at the end of the day. Also mounted near the podium desk was a locked first-aid box; Ou had the key and issued the first-aid supplies.

[39] It appears from Ou's testimony alone that Ou, unlike any other seat framing worker, was allowed to leave the department as he saw fit, and was required to do so several times each day, not just to go to the mill department, but also to confer with Production Supervisor Gonazales, or to confer and coordinate with other department supervisors.

[40] Ou's own descriptions of what he typically does each day after making his first order to the mill department adequately reveal the number of variables associated with Ou's responsibilities for monitoring and assessing department needs, and Ou's descriptions thus provide a glimpse into the degree of judgment and discretion he was required constantly to exercise:

> I come back to my department and start to check out what work has been done, what work next should be done for today or next day. I track how many piece, like example, 300 hard style we cannot finish, how we going to finish that[?] [And later] I come back to my department to look around what they need. What the framer need, what the load-up needs. But they alway needs all day. . . . I get back. I go around department to look what work have been done. Like assemble right now, I running on sequence three, 682. That one is easy. But if we need some more in that parts, I look around.

[41] In a pretrial affidavit, Ou clearly conceded that, ''If someone makes a framing mistake, usually I catch it. I tell the person to redo it.'' At trial, during cross-examination, Ou initially attempted to claim, concerning the re-doing of faulty work, that ''I cannot make any decision by myself, unless somebody ask me to do so.'' Pressed on this, he affirmed that he intended to say that, ''even though [he] knew a frame was not properly made . . . there was nothing [he] could do to stop it, repair it, fix it . . . [u]nless someone told [him] about it and called it back from another department.'' I think Ou was more candid in his affidavit, when he admitted, simply, that he tried to catch faulty work, and when he found it, he ordered that it be redone. I dismiss as entirely improbable and insincere his contrary claims from the witness stand.

[42] Ou described an example which again underscores that seat framing work had a number of ''nonroutine'' elements, requiring a supervisor's oversight to ensure that the work was done right:

> Sometime clip person . . . he don't know what a measure is, what size different. Because size alway different. So I have them put the right clip. If not the clip going to be mix up with that. The spring cannot go like this.

[43] Ou did not contradict Daniel Contreras, a spring-up man in seat framing during Ou's tenure, who testified through a Spanish translator that,

> we work by numbers and if one department was ahead of the others, he [Ou] would come and tell us. He would get us all together and tell us that we had to catch up.
>
> . . . .
>
> Q. MR. CARTER: How many times did this happen while you were in the department?
>
> . . . .
>
> A. Perhaps five times.

and safely and on schedule. It would be unusual for an employer to charge someone with these responsibilities without giving that person reasonable power to discharge them, including at a minimum, the powers to assign or reassign, direct, correct, and if need be, effectively discipline the workers doing the work for which that person was responsible. Yet, as I discuss below, the General Counsel is required to argue that Ou represented just such an unusual case, a supervisor in name only, without authority or discretion to affect the working routine of the employees in his department, a mere ''conduit'' for the decisions made by someone above him. Anticipating these arguments, it is worth summarizing first what the General Counsel does not directly dispute about Ou's proven ''authority,'' as distinguished from the way Ou may have chosen to exercise or not exercise it.

Stanton's witnesses and documentary evidence consistently and harmoniously establish that Ou, like all department supervisors, was *empowered* to issue ''orders,'' which the Plant Rules require employees to ''follow.'' And every employee in Ou's department at the time of his discharge may be presumed to have known this, for they signed copies of the Plant Rules when they were first hired that contained materially the same text in ''Rule 3'' as the text in the version that Ou had signed when himself first hired.[44] And Ou undisputedly had the power not just to issue orders, but to issue verbal and written disciplinary reprimands or warnings when employees did not follow his orders,[45] or when they otherwise committed infractions of company rules. In fact, during his tenure as supervisor, Ou had signed and delivered at least nine written disciplinary slips to employees in his department, which now repose in their personnel files.[46]

Ou's admitted authority also includes the power to remedy production imbalances within his department by taking persons off one job and putting them on another, based on his own assessment of their skills and the shifting requirements of the production schedule.[47] In addition, although Ou obscures the point in his testimony, he does not appear to deny that he is empowered to ''loan'' employees from his department, or to ''borrow'' employees from other departments, if in his judgment such actions are required to maintain balanced production flow.[48] Finally, he is empowered (in the sense of being instructed periodically from above) to evaluate and rank the employees in his department for purposes of layoff priority, a ranking the Company relies on when making periodic cutbacks in the work force.[49]

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[44] Rule 3 underwent subtle but inconsequential mutations in various reprintings over the years after Ou first signed the Rules. As noted above, it originally required employees to ''Follow orders of leadman supervisors,'' but this became ''leadmen supervisors'' in a later version; and still later, by July 1991, a comma had been inserted between ''leadmen'' and ''supervisors.'' Incidentally, Personnel Manager Zurilgen could not explain why this comma had been inserted into the more recent printing of the Rules, and believed it to have been something in the nature of a typo. I cannot find that the insertion of this comma in the more recent printing was intended to impart new meaning to the longstanding Rule 3. Much less could I find that the comma was intended quietly to signal the emergence of some corporate distinction between the terms ''leadman'' and ''supervisor'' where none had been drawn in the past.

[45] I think the General Counsel makes only a sterile semantical point by repeatedly describing Ou's instructions or directions to the workers as ''requests.'' It does not matter that Ou may not have issued ''orders'' in sternly Prussian tones, but typically ''asked'' employees to do things. Where Ou undisputedly had the power not just to issue orders, but to issue verbal and written disciplinary reprimands or warnings when employees did not do what he ''asked'' them to do, I may safely presume that department workers would receive such ''requests'' as authoritative ''directions.''

[46] Seeking to explain away the nine written notices that he signed while a supervisor, Ou stated in substance that he had not issued any of them on his own initiative, but only after being instructed or prodded by Gonzales or Nguyen to write up the offending employee. This attempt to disavow personal responsibility for the warning slips is not convincing in itself; the warnings cover a gamut of employee offenses, including two issued by Ou for ''insubordination''-type offenses (G.C. Exhs. 9(d) and (i)), containing Ou's own narrative comments (e.g., ''He never listen to a supervisor . . . .''). At least as important, these explanations do not even marginally establish that Ou had no *power* to issue writeups on his own intitiative. Indeed, Ou must have believed himself empowered to do so; otherwise it is hard to explain why he admittedly maintained blank copies of disciplinary writeup forms in his own podium desk for ''future'' use. Another problem for the General Counsel's case with Ou's explanations is that they tend to reinforce Stanton's evidence (testimony of Nguyen and Gonzales) that Ou was *expected* as a department supervisor to issue such disciplinary writeups himself, and should not need to be prodded to do so.

[47] Concerning such assignment ''changes,'' Ou clearly conceded in a pretrial affidavit to the Board, ''I do the changes on my own.'' At trial, however, he bluffly declared that ''Augustine'' (Gonzales) would be the person to ''tell [employees] to change from one job to the other.'' I completely disbelieve Ou in this latter respect. Indeed, he soon contradicted this claim when he admitted that he might reassign a framer to help out the spring-up workers, if the latter were falling behind. And note his more general admissions in the following exchange:

> Q. JUDGE NELSON: So what do you tell somebody when you get into that kind of situation? When you see that one person is way down here, and somebody else is way up here on the [production] list.
>
> A. MR. OU: I ask them to help. Because you way over here when—we usually go this way. When the person too far behind, they going to slow production.

[48] Ou claims that he would always ask Gonzales before getting involved in any interdepartment borrowing or loaning of workers. I am inclined to dismiss this as simply one more case where Ou has implausibly sought to portray Gonzales as his constant overseer. But for present purposes, it is sufficient to note that Ou does not dispute the consistent testimony of several Stanton witnesses (including Trishell, Ou's immediate predecessor as seat framing supervisor, and Sal Robles, his post-August 17 successor) that department heads were *allowed* to make these borrowing and loaning arrangements without consulting with Gonzales, and regularly did so.

[49] Ou's testimony on this point (Tr. 210:18–215:5) was evasive, defensive, and unconvincing. He tried to leave the impression that he would resist instructions from higher management to make such rankings. Precisely how he resisted these admitted instructions is not clear from Ou's generalizations. But even assuming that they are true (an assumption I make only for argument's sake, because Nguyen contradicted them, and I found Nguyen the more believeable witness on the point), they tell us more about Ou's personal predilections than about the actual powers that Stanton conferred on him. The fact remains undisputed that Stanton expected *Ou* to designate the people he thought should be laid off. And I think it is irrelevant in this context, although the General Counsel stresses this point, that the ranking judgments made by department supervisors were largely based on facts of company ''record'' (e.g., seniority, productivity, attendance, and history of discipline). While it may be true that higher level managers could perform their own research in the Company's

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While not directly disputing the evidence that Ou, like all department supervisors, had the foregoing powers, the General Counsel seeks to minimize their significance. The most recurring claim in the General Counsel's brief is that the job of seat framing supervisor does not genuinely require the use of any real ''judgment'' or ''discretion'' in the exercise of these powers. This is a claim that, in turn, depends heavily on the supposition that Seat Framing work is so ''routine'' and ''repetitive'' that Ou's own responsibilities could only be understood in like terms.[50]

These characterizations rely entirely on Ou's uniquely deprecating portrait of his job. As I have noted elsewhere, many of Ou's depictions are quite hazily general in tone, or improbable, and they are often hard to reconcile with his admissions about specific details. For example, Ou's attempt to identify Assistant Plant Manager Gonzales as the party who was really ''responsible'' for all but the most ''routine'' aspects of the direction of the seat framing department begs common sense and defies known realities: Gonzales' responsibilities as overall production supervisor covered the work done by upwards of 250 employees in 13 departments; seat framing is the only department located outside the main plant building; Gonzales was not shown to have been a regular presence in seat framing, and could not have been, given his responsibilities elsewhere. And Ou was not entirely consistent in attempting to depict Gonzales as the real fount of all ''nonroutine'' decisions. In what I think was his most unguarded and candid description, Ou substantially admitted that, after about a year on the job, he handled nonroutine problems on his own, and did not seek out Gonzales. Thus, he said (my emphasis):

> *The first year* I get along with Augustine. I need anything or I need a question or I don't know how to run[,] like something make mistake, how do I figure out[?], like people missing, how I got to do, how to do that[?]—I keep contact him all the time. *In the first year*. And *after that, I running on my own* for something that happen.

Moreover, Ou's downplaying characterizations and descriptions of his job collide directly with the more contextually believable descriptions of the same job offered by Trishell, Ou's predecessor, and by Sal Robles, Ou's successor. Trishell and Robles testified harmoniously that in their tenures as seat framing supervisor, they assigned and reassigned workers to different tasks within the department without consultation with anyone higher up, and likewise without such consulation they ''borrowed'' or ''loaned'' workers from or to other supervisors when they perceived it to be necessary to ''catch up'' work in their own or another supervisor's department. They also testified harmoniously that they were periodically instructed to, and did, rank employees in the department for layoff purposes, based on a variety of factors, such as their skills, abilities, tenure on the job, and attendance records.

Clearly, to accept Ou's self-denigrating characterizations, I would have to presume the existence of one or another state of affairs, each quite unlikely: Either the 14 employees in seat framing were not being ''responsibly directed'' at all, or they were being so directed from afar, by someone (Gonzales, according to Ou) who was not shown to have been in a position practically to perform such direction of their work. I have strong doubts about Ou's sincerity in characterizing the seat framing work, and his oversight role in it, as ''easy,'' and in denying that he exercised any personal ''authority'' over the the seat framing workers. But even if I were more inclined than I am to credit his good faith, I still could not give his testimony the weight the General Counsel would have me place on it. At best, I could find it believable that Ou was personally reluctant to exercise some supervisory powers which were clearly vested in his position, those involving disciplinary writeups, and the ranking of employees for layoff purposes. But Ou's personal style or idiosyncrasies when it came to exercising these powers strike me as relatively unweighty considerations in making an assessment of his statutory status, especially given the substantial responsibilities of his job, his actual powers, and the necessary perception of his powers by the employees in his department, who were under instructions to ''follow'' his ''orders,'' and who on occasion received disciplinary writeups from him. In such circumstances, the employees would likely feel the daily influence of Ou's authority even if he may not have chosen to exercise it often, or even only when prodded from above.

h. *Cases distinguished; concluding summary*

Counsel for the General Counsel suggests in her brief that the facts of this case are materially similar to those in three cases where a disputed individual was found not to be a statutory supervisor, *Rahco, Inc.*, 265 NLRB 235, 247–249 (1982); *Chicago Metallic Corp.*, 273 NLRB 1677, 1678–1694 (1985), enfd. 795 F.2d 585 (6th Cir. 1986); and *John N. Hansen Co.*, 293 NLRB 63 (1989). Each of these cases has its own unique mix of facts, and as I read them, they depend in the end on facts or circumstances not presented here. *Rahco* and *John N. Hansen Co.* are most easily distinguishable from this case on these common grounds: (a) the men claimed by the employers to be ''supervisors'' spent most of their time doing bargaining unit work; (b) they were nominally ''responsible'' for only a small group of employees (fewer than in Ou's department); (c) the rank-and-file employees themselves were doing ''routine'' work; and most important, (d) a conceded statutory supervisor was likewise

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record archives for such data, and make layoff selections based on the fruits of such research, it was manifestly easier for them to rely on the first-hand knowledge of such facts possessed by the department supervisor, and on that supervisor's ranking judgments. Accordingly, I cannot dismiss as a merely ''formal'' exercise that Ou was periodically asked by higher management to provide his own list of employees to be targeted for layoff.

[50] Another way the General Counsel tries to minimize Ou's essentially conceded powers is to knock over straw men. Thus the General Counsel's brief devotes much effort to identifying those effective powers that Ou did *not* possess, such as to hire or discharge, or grant wage increases, or change the production sequence established by the lay sheets, or decide to schedule overtime work. I regard these points as essentially irrelevant distractions. It is common in the Board's experience that department supervisors in large-scale manufacturing operations such as Stanton's may have statutory supervisor status even where effective control over hiring and firing authority is centralized in a personnel department, and where decisions concerning production schedules and sequences, wage increases, scheduling of overtime, or layoffs, are made at the top plant management level, or even at a higher, corporate level of management.

directly in charge of the same, relatively small group of workers.[51] *Chicago Metallic Corp.* appears to have roughly similar distinguishing features, and is unique in other ways.[52] I do not find any of these cases controlling, nor even particularly instructive.

On the facts of this case, I cannot find that Ou's responsibilities and activities as seat framing supervisor involved the performance of merely ''routine'' oversight functions, or that his job was merely ''clerical'' in nature. Rather, as elaborated above, I am persuaded that Ou's job involved the regular exercise of judgment and discretion in his employer's interest in the assigning, directing, correcting and disciplining of the 14 employees in his department. I thus find that Ou was a statutory supervisor when Stanton issued him an ultimatum to cease his organizing activities for the Union and when it fired him for not heeding that ultimatum. Because he was a statutory supervisor, Stanton committed no unfair labor practice by these actions, and the complaint must be dismissed in these respects.

[51] Thus, in *Rahco*, the employee in question, Stinson, was the ''assistant supervisor'' of an ''assembly line'' staffed by 11 persons (265 NLRB at 247) doing ''routine'' and ''repetitious'' tasks. Id. at 248. And Stinson himself worked under the ''supervisor'' of the assembly line, Caroon, who was an ''admitted statutory supervisor.'' Id. at 247. Not surprisingly, the Board was not persuaded that it took two statutory supervisors to oversee 11 persons performing routine and repetitive work on a small assembly line. For similar reasons, it is unsurprising that in *John N. Hansen*, the Board was not persuaded that the ''warehouse supervisor,'' Gillespie, who ''principally picks merchandise off shelves and delivers it by forklift to the packing and shipping area'' (293 NLRB at 63), possessed the powers of a statutory supervisor, especially where the warehouse unit was a ''small work force'' (at most, eight employees), and ''[e]ach warehouse employee is supervised by the Respondent's president, John Hansen, with the assistance of [the] Office Manager[,]'' (ibid), and ''[t]he daily operation of the warehouse varies little, and the warehouse employees rarely need to be assigned work or told what to do. They simply continue where they left off the previous day.'' Id. at 64.

[52] The dispositive facts in *Chicago Metallic*—and the precise ratio decidendi of that case—are not easy to tease from the judge's extended findings and characterizations. (273 NLRB 1679–1682, 1688–1694.) What stands out, however, is that claimed Supervisor Picazzo, a union adherent during a preelection campaign, was at the time of his discharge an ''assistant leadman'' (273 NLRB at 1689) in a production department—itself overseen by a ''leadman,'' Kreuger—which apparently employed no more than 18 workers, [*] making ''standardized'' products. The judge noted that there had been no ''showing that [these] employees require close supervision . . . .'' Id. at 1692; my emphasis. And strikingly, entirely unlike herein, the employer had taken the preelection position that Kreuger himself, and other persons identified as ''leadmen,'' including ''assistant leadman'' Picazzo, were *all nonsupervisory* employees, eligible to vote; but when the voting began, the employer's observer had selectively challenged only Picazzo's ballot (but not that cast by Picazzo's supervisor, Kreuger), on the ground that Picazzo was a statutory supervisor. Id. at 1678. Here, by contrast, Stanton maintained at the election that all current department supervisors were ineligible to vote, and the Union agreed, and as a consequence, no current department supervisor was permitted to cast a ballot.

[*] The judge did not make a finding as to the actual number of workers in the production department, but noted that the employer had claimed in its brief that 18 workers were in the department. Id. at 1690 fn. 79.

B. *Phanvongsa's August 19 Statements to Lewis Garcia; the Legal Sufficiency of Stanton's ''Disavowal''*

1. The conflicting versions of the underlying incident

Boravanh (''Teek'') Phanvongsa is the supervisor of the six-person packing department. The complaint alleges at paragraph 6(c) that ''on or about August 19,'' Stanton, through Phanvongsa, (1) ''[t]hreatened to terminate employees if they continued to engage in union activities''; (2) ''[t]hreatened an employee that the plant would be shut down if the Union won the election''; and (3) ''[s]tated that a certain employee [Ry Ou] had been terminated because of his Union activities and, if that employee ever got rehired, he would never work as a leadman again.''

Here, as in several other 8(a)(1) counts discussed below, the General Counsel's sole witness is forklift driver Lewis Garcia, the employee allegedly subjected to Phanvongsa's threats on August 19.[53] Garcia's name headed the Union's list of organizing committee members furnished to Anderson on August 10. He is assigned to the mill department, but his work takes him around the plant. He was an open and unabashed IUE supporter, and often sported IUE buttons and other prounion regalia on his workclothes.

It was while he was making a forklift run to the packing department, says Garcia, that Phanvongsa ''approached'' him, and then said to him that ''the Union is no good.'' According to Garcia, Phanvongsa ''went on to say that if I continue with the union activity . . . I would get myself fired.'' Garcia states he replied, ''[T]hey can't fire me for my union activities.'' Phanvongsa then allegedly ''referred to Reed [sic],[54] saying [']look what happened to Reed [sic].''' Garcia states he rejoined that ''Reed [sic]'' would be ''taken care of'' and would ''get his job back eventually, because what the company did was wrong.'' Phanvongsa then replied, says Garcia, that ''there was no way he'll ever get his job back. And . . . even if there's a slight possibility that Reed [sic] ever got his job back, there is no way that he will work as a leadman again, ever.'' As the two men continued the debate, according to Garcia, Phanvongsa variously made additional threats, that ''if the Union won, the company would go broke because the company doesn't have the money to have a union in it[,]'' and that ''the other people on the committee are going to get laid off or fired if they keep on, and they should quit.''

Phanvongsa, called as Stanton's witness, admitted having had a conversation in ''August'' with Garcia, but his own account of what was said only slightly resembled Garcia's. Thus, Phanvongsa's version suggests that it was Garcia who opened the conversation by extolling the value of the Union, and that Phanvongsa then ''turned [his] back around'' on Garcia, and walked away, saying simply that the ''Union was no good.'' However, Phanvongsa later acknowledged that at some point he had also told Garcia that another furniture company in the area, called ''Kanouski'' (phonetic), ''was in

[53] Although the complaint alleges that Phanvongsa threatened ''employees,'' the evidence would not establish that Phanvongsa's alleged remarks were addressed to, or heard by, anyone other than Garcia.

[54] Garcia was admittedly referrring to Ry Ou, whom he knew as ''Reed.''

business for a long time. They got the union in and I had a friend work there for 15 years. The companies [sic] go broke and close.'' Phanvongsa specifically denied that he ever discussed Ry Ou's situation in this conversation.

In general, I was not impressed by Garcia's demeanor nor the quality of his testimony, which seemed at times overeager, or improvisatory, or improbable, or simply careless.[55] But here, if forced to choose between the two witnesses, I would set aside more general doubts about Garcia's reliability, and would find that the conversation occurred substantially as described by Garcia.[56] However, I am not forced to resolve the credibility issue, much less to decide whether Phanvongsa violated Section 8(a)(1), because even if I were to credit Garcia, I would find for reasons set forth next that Stanton effectively disavowed any unlawful messages that Phanvongsa may have imparted to Garcia.[57]

2. Stanton's posted disavowal and surrounding circumstances

There is no evidence that Garcia told any other employees about his August 19 conversation with Phanvongsa. But it is rather clear that he told the Union about it, for the Union's initial charge in Case 32–CA–12706, filed on August 24, echoes Garcia's version of the August 19 transaction, although it does not specifically identify Phanvongsa as the perpetrator, or Garcia as the target.[58] However, on September 9, Stanton was admittedly put on notice that Phanvongsa's conduct figured in the charge. On that date, after taking an affidavit from Garcia,[59] a Region 32 field examiner telephoned one of Stanton's attorneys, and told him that the Union had ''presented evidence of a prima facie case of 8(a)(1) violations.'' Elaborating, the field examiner named Phanvongsa as the offending supervisor, and described the substance of Garcia's version of the August 19 conversation, without disclosing Garcia's identity, and asked for ''the Employer's response to these allegations.''[60] There is no basis in this record for supposing that Stanton had any knowledge of Phanvongsa's alleged misconduct before the field examiner telephoned Stanton's attorneys in Phoenix, on September 9, a Wednesday.

On the following Monday, September 14, Stanton posted a ''NOTICE TO ALL EMPLOYEES'' on the employee bulletin board in the Stockton plant. In material part, the notice said:

> On August 24, 1992, the Union of Electronic, Electrical, Salaried, Machine & Furniture Workers AFL/CIO filed an unfair labor practice charge against the Company with the National Labor Relations Board. The 32nd Regional Office of the . . . Board is investigating the . . . charge. The Regional Office Investigator advised that on August 19, 1992, near the packing line, the leadperson told an employee that if he continued to engage in union activities, he would be discharged. He [a]lso is alleged to have told the employee that if the Union won the election, the plant would close.
>
> The Company's investigation has not established that these alleged threats occurred or are true. However, as we have pointed out over and over, employees have the right to engage in union activities, as well as the right to refrain from engaging in union activities, which rights are guaranteed by Section 7 of the National Labor Relations Act.
>
> If the statements or threats were made by a leadperson, we regret them and we want each of you to know that they were not authorized or approved by the Company and do not reflect it's [sic] views. No employee will be discharged or discriminated against because of his or her union activities; and this plant will not close in the event the union wins an election.
>
> To make it clear, the Company did not threaten to close the plant and the Company will not in any manner interfere with or coerce employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist the above-named union or any

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[55] His radically different accounts of the timing of his conversation with Phanvongsa is one illustration of the latter quality: He said many times and in many different ways during his direct examination that the conversation with Phanvongsa here in question took place on a date that he could not recall, but that he believed was sometime around the first of October, or ''three to four weeks before the election.'' Clearly, this version did not fit very well with the complaint's ''August 19'' version of the timing. And somehow, following a recess, when he was under cross-examination, Garcia was now able to recall, ''After I think about it, I believe it was August 19th, when [Phanvongsa] approached me with that particular conversation.'' He also somehow recalled clearly now that ''it was somewhere before the petition had been filed with the NLRB.''

[56] Garcia's descriptions of this transaction were reasonably detailed and contextually plausible, and were delivered in a straightforward manner. Phanvongsa seemed by his own demeanor and terse responses to be attempting to obscure certain details, and his account left much to be desired in terms of context, completeness, and internal consistency.

[57] Speaking hypothetically for these purposes, Garcia's account could support a finding that Phanvongsa violated Sec. 8(a)(1) when, in effect, he threatened that Garcia or other employee-members of the IUE's organizing committee would be fired if they did not stop their prounion activities, and when he threatened that ''if the Union won, the company would go broke,'' substantially as alleged in complaint pars. 6(c)(1) and (2), quoted supra. But I would find it more difficult to sustain par. 6(c)(3), which alleges that Phanvongsa independently violated Sec. 8(a)(1) when he ''[s]tated that a certain employee [Ry Ou] had been terminated because of his Union activities and, if that employee ever got rehired, he would never work as a leadman again.'' This count appears to depend on a finding that Ou was an ''employee,'' not, as I have found, a statutory supervisor. Because Ou was a statutory supervisor, Phanvongsa's alleged statements that Ou had been fired for his union activities and would never be rehired as a ''leadman'' would be consistent with what I have found Stanton had a right to do. Thus, even if Phanvongsa made these statements, it is not obvious that they violated Sec. 8(a)(1), or that they required a specific disavowal on Stanton's part.

[58] The Union's August 24 charge alleged that,

> On or about August 19, 1992, the employer threatened to close the plant if the union succeeds in organizing the plant. The employer further stated that certain employees [sic] would never be rehired because of their [sic] union activities and that such employees [sic] would never again work as a leadman for the emplorer [sic].

[59] Garcia gave an affidavit concerning the incident to a Region 32 field examiner on September 1.

[60] My findings in this regard are based on a letter dated September 15 from the field examiner to Stanton's attorney (R. Exh. 2), in which the field examiner ''confirm[ed] the conversation . . . by telephone on September 9.''

other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities. All our employees are free to become, remain, or refrain from becoming a member of any labor organization.

STANTON INDUSTRIES OF CALIFORNIA
BY /s/ Robert Anderson
Robert Anderson, General Manager

Stanton contends that any illegality in Phanvongsa's statements became ''moot'' in the light of Stanton's posted September 14 notice. I substantially agree, finding that Stanton's notice satisfied the ''effective repudiation'' standards set forth in *Passavant*,[61] and applied in subsequent cases, including a recent one, *Gaines Electric Co.*, 309 NLRB 1077, (1992). In *Gaines*, the Board recapitulated the *Passavant* standards in the following terms:

> For a repudiation to be effective, it must be timely, unambiguous, specific in nature to the coercive conduct, free from other proscribed conduct, and adequately published to the employees involved. In addition, it must set forth assurances to employees that no interference with their Section 7 rights will occur in the future, and in fact there must be no unlawful conduct by the employer after publication of the repudiation.

The General Counsel cites two reasons why Stanton's notice was not an ''effective'' repudiation of Phanvongsa's alleged threats, as follows:[62]

> [1] . . . Respondent did, in fact, violate the Act in many other respects. . . . [2] Additionally, there is no evidence that Respondent made any attempt to post such an important notice in any language other than English despite the fact that the majority of its employees do not speak or read English.

Before addressing those points it is worth noting that the General Counsel does not attack the effectiveness of Stanton's notice on the ground that it was untimely, or ambiguous, or lacked requisite specificity, or that it failed to set forth the necessary ''assurances to employees that no interference with their Section 7 rights will occur in the future.'' Indeed, any of those attacks would be unavailing, because in *Broyhill Co.*, 260 NLRB 1366, 1367 (1982), the Board found that a materially similar ''NOTICE TO ALL EMPLOYEES,'' issued in materially similar circumstances by an employer, contained an ''effective repudiation'' under *Passavant*.[63] Moreover, as to the ''timeliness'' of the repudiation, these facts are materially similar to those in *Broyhill*.[64]

Returning to the General Counsel's attacks on Stanton's notice as an effective repudiation, I must reject the General Counsel's first point because I will find that Stanton did not violate the Act in any other respect. The General Counsel's second point is an assertion of fact—that ''the majority of [Stanton's] employees do not speak or read English.'' But the General Counsel cites no support in the record for this assertion; rather she simply makes another assertion of fact lacking record support. Thus, in a footnote appended to the first assertion, the General Counsel states, ''In fact, the ballot for the October 30 election was printed in six different languages.''

I will assume that this latter assertion is true, despite the absence of evidence in this record to support it.[65] I note also that Anderson's campaign speeches were delivered to groups of employees, preselected based on their native language, through an interpreter in that language.[66] But neither of these facts, nor even both of them combined, lend any significant support to the General Counsel's primary assertion that ''the *majority* of [Stanton's] employees do *not speak* or *read*

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[61] *Passavant Memorial Hospital*, 237 NLRB 138 (1978).

[62] G.C. Br. at 26–27; my bracketed numbers inserted.

[63] I think it will be obvious to anyone studying *Broyhill* that whoever authored Stanton's September 14 ''NOTICE TO ALL EMPLOYEES'' (presumably Stanton's attorneys) used the *Broyhill* notice, and the Board majority's comments in that case, as their model and guide. The only difference in message I can detect is that in the *Broyhill* notice, the employer announced,

> We have made an investigation of the unfair labor practice charge allegations, and have *concluded* that a supervisor of the company *may have* acted in an improper manner. We regret this, and we want each of you to know that the . . . Act gives employees the following rights: [emphasis added; remaining text omitted].

Here, by contrast, Stanton declared that its ''investigation has not established that these alleged threats occurred or are true[,]'' (emphasis added), and couched its ''regret'' in a more conditional mood, saying (emphasis added), ''If the statements or threats were made . . . we regret them and we want each of you to know . . . .'' This difference seems unimportant in assessing the effectiveness of Stanton's notice as a repudiation of Phanvongsa's alleged misconduct. Even when the Board orders notice-posting to remedy a violation found after litigation, it does not require the employer to ''confess'' to the violation in the notice.

[64] In *Broyhill*, the employer published the notice on May 6, roughly 5 weeks after ''Supervisor Junker'' had allegedly made certain statements which the notice was intended to disavow. The *Broyhill* majority noted pertinently,

> It does not appear that Respondent learned of Junker's conduct until May 5, when the Board agent conducting the investigation met with officials of Respondent and its attorney. [260 NLRB at 1366].

And in reply to the dissenters' objections based on the ''5-week'' hiatus between the alleged supervisory misconduct and the general manager's published disavowal, the *Broyhill* majority observed that the dissenters ''do not dispute that Respondent acted in good faith and lacked knowledge of Junker's conduct prior to May 5.'' The majority further stated (id., later paragraph) that,

> it must be remembered that in litigated cases Board notices are never posted within 5 weeks of the commission of the unfair labor practices.

[65] It is not necessarily fatal to the General Counsel's point that this record does not disclose the forms of ballots used in the October 30 election, nor that the General Counsel has not lodged specimen copies of the ballots with me. Such facts are proper subjects for administrative notice, and they are revealed in records customarily maintained in the offices of Region 32. Thus I may assume that counsel for the General Counsel has accurately described what the records in her office would show, were I to make administrative inquiry.

[66] Anderson recalled that his speeches were translated by interpreters into,

> Vietnamese, Spanish, Cambodian, Laos, we tried to do it for every nationality that we had at the plant.

English.''[67] Thus, I find that the General Counsel's primary assertion lacks substantial support in the record.

As a separate matter, I might extrapolate from my exposure to a small number of Stanton's employees during the trial that a minority in the larger work force, like a minority of the witnesses, are effectively unable to read English, and therefore, that at least some employees at the plant were unable to read or digest Stanton's disavowal notice. This is not the objection made by the General Counsel, and it would be a small objection in any case, for these reasons: No employee other than Garcia was shown to have heard or learned of Phanvongsa's alleged August 19 threats, themselves uttered in English. Garcia admittedly read and digested the contents of Stanton's September 14 disavowal notice.[68] Thus, the notice was fully ''effective'' in reaching the target of Phanvongsa's alleged threats. Moreover, given other findings above, that notice may be presumed to have been read by a substantial number of other workers capable of understanding it; indeed, there is no substantial basis in the record for supposing that it was not read and digested by a majority of the work force.[69]

Thus, here, as in *Gaines Electric*, supra, I would find that Stanton's notice was ''more than adequately published, in light of the isolated nature of the matter and the absence of dissemination to other employees.''[70] And because Stanton's notice renders the issue moot, I will not decide whether Phanvongsa's statements, as described by Garcia, violated the Act. Rather, I will recommend dismissal of the complaint in this respect.[71]

[67] A Regional Director's decision to use multilanguage ballots and preelection notices in a given election setting does not amount to a conclusive ''finding'' as to the English-literacy or fluency levels in the voting unit, for Regional Directors are not required to and do not attempt to conduct a systematic inquiry into such matters. Rather, ''the Board will generally provide [preelection] notices in other languages if *requested by a party* . . . .'' Morris, *The Developing Labor Law*, 2d Ed., Vol. I, p. 392 (emphasis added). Accordingly, if the ballots were printed in six languages, it is at least as likely as not that the Regional Director was merely acting on a party's request, and perhaps out of a recognition that Stanton's Stockton work force was comprised of a substantial number of immigrants from Southeast Asian countries where a variety of languages are spoken, and of other workers whose native language is Spanish, all of whom might have difficulty comprehending English-only ballots. Similar considerations may be presumed to have influenced Stanton's decision to use interpreters during Anderson's campaign speeches, where it was equally important to Stanton that its campaign messages be heard and digested by the largest number of employees. Neither fact, however, tells us whether or not the ''majority'' of the workers are *unable* to *speak* or *read* English.

[68] Garcia testified in fluent and unaccented American English—indeed, I presume English is his native language. He is admittedly English literate, and he read and signed three affidavits written in English during the investigation.

[69] See, by analogy, *Wicks Forest Industries*, 227 NLRB 299 (1976), where the Board overruled the employer's postelection objections based on the lack of bilingual notices, noting that the employer had failed to show that a substantial number of Spanish-surnamed employees could not read or understand English.

[70] 309 NLRB 1077.

[71] I note that Phanvongsa's statements, made before the petition was filed on August 21, are not invoked by the Union as grounds for setting aside the election. Indeed, as previously noted, prepetition conduct cannot normally be relied on to set aside an election, under the Board's *Ideal Electric* rule. In any case, Stanton's disavowal notice, published more than 6 weeks before the election, was effective in vitiating the impact of Phanvongsa's statements on the October 30 election. Compare, e.g., *Gaines Electric*, supra, finding that the employer's disavowals were made ''two weeks'' before the election, and that the disavowals ''acted to restore in a timely fashion the laboratory conditions for a fair election.''

III. ALLEGED POSTPETITION UNFAIR LABOR PRACTICES

A. *Anderson's August 24 Warning Concerning Garcia's Supposed Violation of Solicitation and Distribution Rule*

1. Introduction

Rule 8 of Stanton's plant rules says:

> (8) No solicitation or distribution of literature of any kind during working hours in work areas. Working hours shall exclude non-duty lunch periods and rest periods.

The lawfulness of rule 8 has not been placed into issue.

Three distinct 8(a)(1) counts in the complaint, quoted below in section 3, allege in the aggregate that Stanton ''enforced'' rule 8 selectively, against only ''pro-union'' violations. All three counts are vitalized by a single incident on August 24, in which Anderson admittedly called employee Garcia to his office, and remonstrated with Garcia concerning a report Anderson had received that Garcia had been passing out union papers on worktime in a work area. Garcia denies that he did what Anderson was accusing him of, and his version of the August 24 session with Anderson differs significantly from Anderson's on several points. Crediting Anderson concerning these events, I will conclude that the General Counsel has failed to establish any of the violations alleged in the complaint that are related to these events, because Anderson's remarks to Garcia on August 24 were legally innocuous in themselves, and the General Counsel's evidence of alleged toleration by the Company of other types of arguable violations of rule 8 was too equivocal or insubstantial to show that Garcia suffered from a form of ''disparate'' treatment at Anderson's hands. I will further reject an additional, ''Burnup & Sims'' theory of violation, advanced by the General Counsel for the first time on brief.

2. Immediate background; conflicting versions of August 24 meeting; credibility resolutions

This is how Anderson, on cross-examination by the General Counsel, explained ''[w]hat prompted [him] to bring [Garcia] into the office'' on August 24:

> A. Because one of the other super—one of the other guys was coming from the other building and seen him [i.e., Garcia] get off his [H]yster [a brand of forklift] and go over and talk to these two guys and hand out some papers, and come and complain to me. And so, the next morning I thought I would just set it strai[gh]t and tell Lewis that. And that's why I had him come into the office.
>
> Q. Who is the supervisor that told you about that?

A. Tom Lyles [sic],[72] I seen him when he was coming back from the other building.

. . . .

Q. What was it that Mr. Lyle told you he saw?

A. Mr. Lyle told me that he'd seen him jump off his [H]yster and go over and talk to a couple guys and hand out papers. And was talking to them during work hours. And so I—

Q. Did Mr. Lyle tell you that he could hear what was said?

A. I don't know if he could hear, or not. He was right there by them he said.

. . . .

Q. JUDGE NELSON: Did he report that he had heard anything—

A. He came to me and reported to me that he was coming from the other building, seen Lewis get off his [H]yster, go over and talk to two other gentlemen, and give them some paper work and talk to them. He didn't tell me that he could hear them talk. . . . He just told me that.

Q. MS. MARCOTTE: Did he tell you that he had seen the papers that Lewis gave the employees?

A. . . . He didn't know what was on them. He said that he was handing them papers.

Q. So, Lewis could have been handing them [the] San Francisco Chronicle?

A. Well, Tom told me that he talked to one of the guys and he told him that it was Union stuff. I wouldn't have went out there just to pick on him.

Q. And so, who were the guys who were involved?

A. Tom said, that there was a couple other gentlemen out back. And that he talked to [inaudible] and somebody else. But I never followed through on it.

Q. You didn't talk to any of the employees yourself?

A. No. Nope. Talked only to Lewis.

These are the material portions of Garcia's testimony concerning his August 24 meeting with Anderson, and other surrounding circumstances (emphasis added):

> A. Bob Anderson said that he called me in[to] the office because he was told that somebody had seen me pass a union card the Friday before. And then he went on to say that it was against company rules to pass union cards during working hours. I told him that I know the rules. And that whoever saw me passing a union card mistakenly believed they saw me passing a union card, because I did not pass a union card during working hours as they say.[73] He would not tell me who saw me, you know, but just that it was the Friday before during working hours. Then he went on to, you know, explain about the rules of soliciting, and that it could only be done in the morning, during break time, during lunch, and after work. I told him that I know what the rules are. And that I myself go around telling the rest of the committee for the union those same rules. Because I know what the rules are, and I stay with them. *He also went on to say that if it is ever reported by somebody in the Company that I am passing union literature during working hours, that he would take it to the Labor Board, and that he would also take drastic action against me. And then he wanted me to sign this warning slip for him. And I told him that, you know, this is wrong, but I'll sign it. So I signed it and left.*

These are material portions of Anderson's recollections concerning the same meeting, offered during cross-examination by the General Counsel:

> Q. Now, regarding the meeting that you had with Lewis Garcia in your office, you testified about . . . who was present in that meeting?
>
> A. Tom Lyle, Agustin, and me.[74]
>
> . . . .
>
> Q. What was said?
>
> . . . .
>
> A. . . . I told Lewis I had seen him, you know, heard a complaint about him handing out papers and talking Union during company time. And that I didn't, you know, care what he did, you know, at lunch and at break, but [th]at I didn't want it go on during work hours. And that's about all I really said, I think.
>
> Q. So, you never asked Lewis whether he had in fact done that?
>
> A. No.
>
> Q. Did anyone else say anything?
>
> A. The other two people, no.
>
> Q. What about Lewis?
>
> A. No. I don't think Lewis said anything. He just kind of shrugged his shoulders. That was about it.
>
> Q. He didn't say anything at all?
>
> A. If he did, I didn't, I don't remember. Like I said, it was early in the morning and it was—I brought him in and told him that and I really don't remember what he said, it was so long ago, if he said anything.

Elsewhere, Anderson specifically denied that he wrote up any form of ''warning'' notice, or asked Garcia to sign any paper, and he insisted that ''[n]othing went into Lewis's file.'' I credit him on these latter points. Garcia's contrary claims were uttered with a kind of glibness that did not inspire my confidence, and there are substantial grounds for in-

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[72] The person in question, otherwise called ''Lyle'' by Anderson, was identified by Anderson as someone who ''runs the customer service in trucking and that, in the office next to me.'' Although the General Counsel's introductory question assumed that Lyle was a ''supervisor,'' there is no other evidence of his status or function. His association with ''customer service'' suggests that he did not supervise, or work with, employees in the putative voting/bargaining unit.

[73] Concerning this, the General Counsel questioned Garcia further, as follows (emphasis added):

> Q. Did you pass any union *cards or literature* to employees during working hours on the Friday before your conversation with Mr. Anderson?
>
> A. No.
>
> Q. Is there any reason why you say that?
>
> A. Yes, there's good reason why I say that. I knew well beforehand that that same Friday, the union cards were being turned in to the Labor Board. And I had no need to go around to have union cards signed anymore.

[74] Garcia likewise recalled that someone named ''Tom'' was present, but did not mention ''Agustin'' (Gonzales) as having been present. Neither Lyle nor Gonzales testified about this transaction.

ferring that he improvised these claims recently.[75] Likewise, from his demeanor and style of testifying, I treat as inventions Garcia's claims that Anderson threatened (emphasis added) ''to *take it to the Labor Board* and . . . take *drastic* action'' against Garcia if he were to hear any future reports that Garcia was violating rule 8.[76] Stripped of these implausible embellishments, Garcia's account is roughly harmonious with Anderson's. Any remaining discrepancies are irrelevant to the legal issues presented,[77] but I would credit Anderson over Garcia on such small questions of detail, because Anderson impressed me more favorably than Garcia in terms of overall performance and demeanor. Thus, I find that Anderson told Garcia, in effect, that he had heard a report that Garcia had recently engaged in proscribed distribution of union-related papers on work time, and warned him against future violations of the rule, but also clearly advised him that he was free to do such things during lunch and break periods.

3. The General Counsel's theories of violation; supplemental findings and conclusions

a. *The theories embedded in the complaint*

Concerning this incident, the complaint alleges, at paragraph 6(i), that Stanton, ''[o]n or about August 24, acting through Anderson,''

> (1) [deleted][78]
>
> (2) Selectively and disparately enforced the . . . Rule by threatening to ''take action'' against an employee [Garcia] if he continued to solicit for the Union during ''working hours,'' while allowing solicitation concerning other non-work related matters during ''working hours.''
>
> (3) Created the impression that an employee's [Garcia's] Union activities were under surveillance by telling an employee [Garcia] that he was seen passing out Union cards on ''working time,'' when solicitation-distribution during working time was routinely tolerated for non-union, non-work-related activities.
>
> (4) On various occasions throughout October, . . . [Stanton] has applied and enforced the . . . Rule in a disparate fashion by permitting employees engaged in anti-union activities to engage in conduct that violated the . . . Rule.

Obviously, the notion of ''disparate enforcement'' is interwoven into each of these counts,[79] and to that extent, each of these counts depends in the end on proof of such disparity. Before examining the adequacy of the General Counsel's proof in that area, however, I will discuss and dispose of an independent theory of violation advanced by the General Counsel on brief, one which I find was not fairly encompassed by the above counts in the complaint.

b. *The ''Burnup & Sims'' theory*

The complaint does not directly call into question whether Anderson *accurately* accused Garcia of a rule 8 violation; rather, the counts quoted above can be understood best as challenges to Anderson's right to ''enforce'' rule 8 *at all* against Garcia's supposed violations, where such ''enforcement'' action was ''disparate[ly]'' administered, only to ''pro-union'' violations of the rule. And given the complaint's emphasis on a disparate treatment theory of violation, I can only interpret as a product of afterthought that the General Counsel's opening argument concerning Anderson's August 24 session with Garcia is one that relies not at all on proof of disparity of treatment; rather, it rests simply on Garcia's claim that he was not, in fact, guilty of the violation which Anderson accused him of committing. Thus, on brief, prosecuting counsel begins her argument by quoting from Judge Michael O. Miller's decision, adopted by the Board, in *Keco Industries*, 306 NLRB 15 (1992), as follows:

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[75] After Garcia testified concerning the ''warning slip'' that Anderson supposedly made him sign, the General Counsel stipulated that ''Garcia's affidavit of September 1, 1992, taken by a Board agent pursuant to investigation of charges in this case . . . makes no mention of Anderson writing up a disciplinary note that he requested Garcia to sign.'' I note that this affidavit, in which Garcia purported to describe the August 24 meeting with Anderson, was given by Garcia only a week after that meeting transpired. Also, the complaint makes no claim that Anderson prepared or required Garcia to sign a written warning; rather, purporting to quote Anderson, it only alleges that Anderson ''threaten[ed] to 'take action''' against Garcia if he violated rule 8 again. Also, as I note below, the General Counsel appears on brief not to rely on Garcia's claim that Anderson required him to sign some kind of written warning.

[76] The underscored elements also smell freshly cooked to me. As I have already noted, the complaint in this respect, apparently based solely on Garcia's investigative input, purports to quote Anderson only as having ''threaten[ed] to 'take action' against [Garcia] if he continued to solicit for the Union during 'working hours.'''

[77] For example, Garcia recalls that Anderson accused him of passing out ''union *cards*'' on the previous ''Friday.'' Anderson recalls that he accused Garcia of passing out union-related ''papers'' on the day before he summoned Garcia to his office.

[78] As previously noted, the General Counsel amended the complaint at trial to delete this first subparagraph, alleging that on August 24, Stanton, through Anderson, ''verbally promulgated an overbroad no-solicitation rule.''

[79] Count (4) deserves separate introductory comment, largely because of a confusing dissonance between its text, standing alone, and its subordinate placement under a paragraph introduced by the phrase, ''On . . . August 24, acting through Anderson[.]'' Inspected by itself, count (4) appears to allege a pattern of ''disparate enforcement'' of rule 8 by Stanton ''throughout October.'' This might suggest that Stanton engaged ''throughout October'' in an *ongoing* pattern of cracking down on ''pro-union'' violations of the rule, while tolerating ''anti-union'' activities that violated the rule. But a count that intends to allege such an independent pattern of disparate enforcement ''throughout October'' does not belong either grammatically or as a matter of legal substance as a subcount following the introductory phrase, ''On . . . August 24, acting through Anderson[.]'' And Anderson's August 24 session with Garcia is the only instance of record where rule 8 was arguably ''enforced'' against an employee involved in a supposed ''pro-union'' violation of the rule. Moreover, count (4) does not specifically allege any ''October'' crackdown on ''pro-union'' violations of the rule; it only alleges a company tolerance in that month for ''antiunion'' violations of the rule. Thus, it appears after analysis that count (4) was not intended to allege independently unlawful conduct by Stanton in October; rather, it merely alleges the existence of additional circumstances *after* Anderson's August 24 session with Garcia which might support the claims made in counts (2) and (3), that Anderson's treatment of Garcia on August 24 amounted to a ''disparate enforcement'' of rule 8. And it is based on these considerations that I have earlier described *all* of the counts in question as having been ''vitalized'' by Anderson's August 24 session with Garcia.

> Where an employee is disciplined for having engaged in misconduct in the course of union activity, the employer's honest belief that the activity was unprotected is not a defense if, in fact, the misconduct did not occur. *NLRB v. Burnup & Sims, Inc*., 379 U.S. 21 (1964); *Rubin Bros. Footwear*, 99 NLRB 610 (1952). See also *Huss & Schlieper Co.*, 194 NLRB 572, 577 (1971).[80]

I take no issue with this statement of the law,[81] but for reasons explained below, I doubt its applicability to these facts.

The General Counsel next argues that the ''evidence . . . does not even support a finding that Anderson had an honest belief that Garcia had engaged in unprotected activity.'' She emphasizes that Anderson relied on a ''second-hand account,'' and ''made no attempt personally to investigate the matter.'' If, contrary to my reasoning below, the ultimate issue turned on this point, I would find, contrary to the General Counsel, that Anderson did have an honest belief, based on a report from Lyle, that Garcia had engaged in distributing of union papers on working time in a work area. Anderson's explanation, supra, was simple, plausible, and credibly delivered; I believe him.[82]

Leaving behind this challenge to the honesty of Anderson's ''belief,'' the General Counsel states, ''Moreover, Garcia credibly testified that he had not distributed any union cards on the day in question[.]'' (Without embracing the adjective ''credibly,'' I observe that it is at least true that Garcia's denials stand uncontradicted; Stanton called no witnesses with first-hand knowledge of the underlying incident.)[83] ''Accordingly,'' the General Counsel reasons, ''it must be concluded that Garcia did not engage in any unprotected union solicitation or distribution[.]'' Thus, under the General Counsel's apparent reasoning, a finding that Garcia was not, in fact, guilty of unprotected activity would end the inquiry, and would conclusively establish that Anderson's statements to Garcia violated the Act.

I would dismiss this new theory without reaching its factual merits, because I think it would violate Stanton's due process rights to decide the merits. The complaint cannot be fairly understood to encompass this theory, and as a consequence, I cannot find that there was full and fair litigation of the question of central relevance to such a theory—What, ''in fact,'' happened in the underlying incident? Again, the complaint did not give Stanton notice that the ''honesty'' of Anderson's ''belief'' as to Garcia's supposed misconduct would be an issue; it did not allege, for example, that Anderson accused Garcia falsely, or in bad faith. Rather, it simply called into question the even-handedness of Anderson's treatment of Garcia, after having received the information that gave rise to his belief. Thus, what, ''in fact,'' transpired during the underlying incident was seemingly irrelevant to the accusations in the complaint, and this could easily explain why Stanton did not call witnesses with first-hand knowledge of the underlying incident.

In the alternative, reaching the merits of this new theory, I would find that the *Burnup & Sims* analysis invoked in *Keco* Industries does not apply here, essentially because I cannot find any credible evidence that Garcia received actual ''discipline'' for a supposed act of misconduct.[84] Here, I find, Anderson did not administer discipline to Garcia by the statements I have found he made; at most, he implied that Garcia could suffer discipline if Anderson learned of any future violations of rule 8 on Garcia's part. Because of this, I think it overstates the situation to characterize Anderson's session with Garcia as involving an ''enforce[ment]'' of rule 8. I would call it a ''reminder'' session, or a ''mere warning'' session, i.e., one involving no ''punishment,'' one in which Anderson was apparently more intent on making sure that Garcia conformed his future conduct to rule 8's proscriptions than in investigating the truth or falsity of Lyle's accusations against Garcia, much less in punishing Garcia based on Lyle's accusations.[85]

To extend the *Burnup & Sims* analysis applied in *Keco* to sessions such as this one, where the employer takes no action to impair the supposedly offending employee's job status or tenure, not even to the extent of placing an adverse entry in the employee's personnel file, is not clearly authorized by *Keco*, nor by the authorities which informed that decision. I judge it unlikely that these holdings were intended to be applied so mechanically as to put an employer in legal jeapordy

[80] *Keco Industries*, supra.

[81] See *Wilshire Foam Products*, 282 NLRB 1137, 1157–1158 (1987).

[82] Stanton's failure to call Lyle to corroborate Anderson might arguably invite an inference adverse to Stanton even as to the ''honest belief'' element, especially if Lyle had been shown to be a statutory supervisor or agent of Stanton, and therefore not someone who was ''equally available'' to all parties as a witness. Cf. *International Automated Machines*, 285 NLRB 1122, 1123 (1987). But there was no such showing, and in any case, an adverse inference is not mandated, merely permissible. *Auto Workers (Gyrodyne Co.) v. NLRB* , 459 F.2d 1329, 1336–1337 (D.C. Cir. 1972). For reasons summarized above and repeated below, I have found that the complaint did not give Stanton notice that the ''honesty'' of Anderson's ''belief'' as to Garcia's supposed misconduct would be an issue. Thus, Stanton's failure to call Lyle to ''corroborate'' Anderson could well have resulted from a reasonable judgment on the part of Stanton's attorneys that the honesty of Anderson's belief was not under attack. For that reason alone, Lyle's absence from the witness stand cannot reasonably justify a finding that Anderson was not telling the truth in describing his reason for calling Garcia to his office.

[83] But see fn. 82.

[84] The language borrowed by the General Counsel from Judge Miller's decision in Keco describes the analysis to be used when an employee receives ''discipline'' for having committed supposed misconduct ''in the course of union activity.'' And in *Keco*, there was unmistakable evidence that employee Morris received actual discipline, a ''formal . . . memorandum of reprimand,'' which was placed in Morris' personnel file, despite his protest that he had not, in fact, done what the company was disciplining him for having done. 306 NLRB 15. See also *Wilshire Foam Products*, supra, applying *Burnup & Sims* analysis and finding violation where, as in *Keco*, the employer issued a written ''Employee Warning Notice which was placed in [the] personnel file'' of an employee who was not, in fact, guilty of the ''coercing and pressuring [of] co-workers regarding the subject of the Union'' charged in the warning notice. 282 NLRB at 1157–1158.

[85] The General Counsel takes a dark view of Anderson's admitted disinclination to investigate the underlying facts. To me, this more easily supports the counterinterpretation suggested above—that Anderson had no interest in disciplining Garcia, nor in making a big deal out of Garcia's supposed previous violation, but wished only to get the message to Garcia that *if* Garcia had, in fact, distributed union papers on worktime and in a work area, this violated a company rule, and Garcia should not do it in the future.

simply because the employer, in good-faith, verbally counsels with a prounion employee about a supposed rule violation without first ''investigating'' the underlying facts and assuring itself that the employee was *probably* guilty of the supposed offense. Under *Keco* and the precedents which informed that decision, this may well be the practical burden under which an employer labors if the employer is bent on administering ''discipline'' to the supposedly offending employee. But absent palpable disciplinary action, I think the employer's good-faith belief of misconduct is sufficient defense to a mere verbal warning to an employee not to violate a lawful company rule in the future. Thus, I conclude that even if Anderson's information from Lyle was inaccurate, Stanton did not violate Section 8(a)(1) merely because Anderson relayed to Garcia what he had heard, and warned him against future violations of rule 8.

I emphasize, however, that if it can be demonstrated that Stanton chose to ''counsel'' with, or ''remind,'' or ''warn'' *only* ''pro-union'' employees believed to have violated rule 8, this would change the analysis. Thus, I return next to the ''disparate enforcement'' claims which seem originally to have inspired the General Counsel's decision to prosecute Anderson's August 24 statements to Garcia.

c. *The adequacy of the General Counsel's evidence of disparate enforcement of the rule*

The General Counsel seeks ultimately to have me compare how Anderson dealt with Garcia on August 24 with how Anderson—or Stanton as an institution—dealt with, or failed to deal with, other arguable violations of rule 8. The General Counsel's proof of disparity falls into two categories, and each category of proof has its own difficulties, as I explain next.

(i) ''Sam's'' antiunion broadcasts on the plant intercom

The complaint suggests in one count the existence of a pattern of company tolerance of ''anti-union'' violations of rule 8 ''throughout October.'' The proof focuses on the antiunion statements made over the plant public address system by a mechanic associated with the sewing department named Sam Sao, known to most employees only as ''Sam.'' The proof is fragmentary, and especially difficult to put together into a reliable sequence, largely because the witnesses were either vague about the dates in question, or even when purporting to recall specific dates, they sometimes left grounds for doubting the reliability of those specific memories.

From the totality of the testimony, I find that Sam Sao used the PA system on several occasions to broadcast brief messages, such as ''Vote no Union,'' or ''Union no good,'' during the final week or weeks of the election campaign.[86] Based on a credible point of convergence in the testimonies of Lewis Garcia and Martha Pimentel, I find that the last time Sam made such a broadcast was on the day before the election, on October 29, when Sam used the loudspeaker to direct remarks at Garcia, as he was passing through the plant. On that occasion, I find, Sam said words closely to the effect, ''Lewis Garcia! Union no good.''

It is worth pausing to describe the PA system: Witnesses for both parties agree that each department had its own telephone, which could be used to broadcast messages over a loudspeaker, to a greater or narrower audience, depending on which buttons were pushed.[87] Thus, someone speaking on a department telephone in the PA mode might be heard either throughout the plant, or simply within the vicinity of the PA-user. A switch in the walled-off company office areas enabled persons in the offices to tune in on these in-plant PA transmissions, but the office people normally kept that switch off, because plant transmissions were frequent and distracting.

On an uncertain date in or near the last week in October, sewing employee Heang Kim Sem complained to Zurilgen that Sam was using the ''intercom'' to broadcast antiunion messages. Zurilgen soon passed this complaint to Anderson. Anderson admits that he ''didn't do anything right off the bat,'' but ''probably a few days'' later, as he was walking through the plant at quitting time, he says he recognized Sam's voice making a statement (presumably an antiunion one, although Anderson was no more specific) over the PA. Gonzales likewise described having heard Sam make such a broadcast in this period, just after the bell sounded at quitting time, and he says that he mentioned this to Anderson. The ''next morning,'' says Anderson, he called Sam into his office, along with Gonzales, where he ''just told Sam that I heard him on the speaker the night before, and I didn't want him on it no more.'' Gonzales testified in substantially similar terms about what Anderson said to Sam.

Apparently seeking to explain why he delayed acting on Zurilgen's report until he personally heard Sam make a statement on the PA system, Anderson testified that on another occasion in this period, he heard *Garcia* broadcast a *prounion* message over the loudspeaker, but chose not to make an issue of this with Garcia. Garcia never denied having done so. Two other witnesses, Gonzales, and sewing employee Elsie Rodriguez, credibly testified that they heard Garcia use the loudspeaker to broadcast prounion messages; Rodriguez says she heard Garcia do this more than once. I credit Anderson that he directly heard Garcia on one such occasion, but ignored the offense, wishing ''[j]ust to . . . keep trouble down, or not bother.''[88] I infer from his testi-

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[86] In so finding, I have reviewed the testimony of the General Counsel's three witnesses concerning Sam's activities, Lewis Garcia, and sewing department workers Heang Kim Sem and Martha Pimentel, and the testimony of Stanton's witnesses Anderson, Gonzales, and Zurilgen, further described infra. This combined testimony will support a finding that Sam broadcast such messages ''several'' times, perhaps as many as four, but this latter total would require me to place greater reliance on Garcia's and Heang Kim Sem's memories than I would prefer, given the frailties each showed. Neither would I aggregate the number of instances each of these witnesses described to determine the total number of times Sam made such broadcasts. I deem it probable that in many cases they were describing the same broadcast, as each of them variously heard it from different locations in the plant, and as they variously understood it over the din of the plant floor.

[87] The amplified PA mode was used for a variety of purposes, for example as a paging system, or by supervisors to deliver a message to the assembled department workers. Sometimes a nonsupervisory employee would use the same system for some work-related purpose. Lewis Garcia acknowledges having done so himself, ''all the time.''

[88] Gonzales testified that Anderson used a similar explanation for taking no action when Gonzales reported to Anderson that he had

mony that he gave Zurilgen's report of Sam Sao's broadcasts similarly low priority, until he heard Sam issue yet another broadcast.

Zurilgen specifically denied ever having personally heard Sam make such broadcasts. Anderson and Gonzales imply that the only time they heard Sam make such broadcasts was the one which caused Anderson to remonstrate with Sam the next day. The only evidence suggesting that company agents had additional knowledge of Sam's activities beyond those just described can be found in Garcia's uncorroborated testimony that Anderson and Zurilgen were at a meeting in the ''TSP building,'' attended by about 30 English-speaking employees, when Sam's antiunion vocalizations came over the loudspeaker at least twice. In his testimony, Garcia said that this occurred about ''three weeks before the election.'' In a pretrial affidavit given on December 15, however, he said that this meeting occurred on October 22. Zurilgen specifically denied having heard such remarks from Sam in any meetings held in this period, all of which she claims to have attended. Anderson was not questioned about this. I would not rely on Garcia's testimony to find that company managers knew about Sam's activities before they admit to having learned about them.[89]

Because the timing of all the events described above is not clear, I cannot find that Sam violated Anderson's instruction not to use the louspeaker anymore, much less that he did so in a way that came to the attention of company supervisors or managers. Rather, all incidents of Sam's activities described by the General Counsel's witnesses could be found to have taken place either before the uncertain date when Heang Kim Sem complained to Zurilgen, or during the interval of ''a few days'' described by Anderson between the point Zurilgen passed on this complaint to him and the uncertain date he remonstrated with Sam.

The General Counsel relies on Anderson's descriptions to argue that Anderson treated Sam Sao's offense far more lightly than he treated Garcia's supposed offense. But the General Counsel's comparisons also assume, contrary to my findings above, that Garcia's account of his August 24 session with Anderson is the more reliable one. Thus, on brief, the General Counsel cites Garcia's discredited testimony that Anderson threatened to take ''drastic action'' against Garcia for any future violations, and contrasts this with Anderson's failure to issue a comparable ''threat of such severe future action'' to Sam.[90] When I compare the *credited* evidence concerning Anderson's handling of the two incidents, I reach conclusions quite opposite to those urged by the General Counsel. I find that Anderson handled both Garcia's supposed infraction and Sam's in substantially similar ways, by telling each employee, in effect, to knock it off. And clearly, this finding is incompatible with the General Counsel's overarching claim that Anderson's treatment of Garcia on August 24 was disparately harsh.

In sum, disparate enforcement cannot be found by comparing these two episodes; therefore, if it can be found at all, we must look elsewhere for evidence of it.

(ii) Sports betting

The General Counsel also proffered evidence through employees Alonzo Tomas and Lewis Garcia showing, respectively, that Supervisor Phanvongsa solicited football bets from employees on or about October 24, and that Plant Manager Nguyen more regularly conducted sports gambling activities, tantamount to bookmaking. Phanvongsa and Nguyen each disputed these accounts, but I credit Tomas' version of Phanvongsa's activities,[91] and I substantially credit Garcia's depictions of Nguyen's activities.[92] The betting activities practiced by Nguyen and Phanvongsa were not shown to

heard Garcia make a prounion broadcast, probably the same one Anderson had heard.

[89] In a suspiciously large number of cases, Garcia—and only Garcia—became the source of evidentiary elements important to the General Counsel's theory of prosecution. His embellished version of his August 24 meeting with Anderson, supra, was perhaps the most obvious example of this phenomenon. Here, too, I suspect that Garcia's convenient, but uncorroborated recollections about Sam's broadcasts during the TSP building meeting reflect invention on his part.

[90] G.C. Br. at 21. Strikingly, the General Counsel does *not* cite as evidence of disparity in treatment Garcia's (discredited) claim that Anderson required him to sign some kind of written warning notice.

[91] Tomas testified, in substance, as follows: On or about October 24, he saw Packing Supervisor Phanvongsa handing out printed betting sheets to employees during worktime and in a work area. Tomas approached Phanvongsa and asked for one, whereupon Phanvongsa gave one to him, which Tomas retained and furnished as evidence during the investigation of these cases, and which was received in evidence as G.C. Exh. 13.[*] Phanvongsa, showing discomfort, and testifying evasively, grudgingly admitted that he had once given such a sheet to Tomas. He said it was during ''lunch'' time, which I disbelieve. He tried to leave the impression that this was a one-time incident. I have my doubts, for Phanvongsa explained that he was unable to identify G.C. Exh. 13 as the sheet he had given to Tomas because he had printed so many such sheets for different weekends' games that he could no longer recall *which* one he had given to Tomas.

[*] The sheet Tomas got from Phanvongsa was a list of the forthcoming weekend's college and professional football games and the point spread for each game; it included lines at the bottom where the bettor was to place his or her ''name'' and the ''amount'' of the bet.

[92] Garcia testified, in substance, that ''Khanh Nguyen'' (i.e., the plant manager) [*] regularly solicited bets on sporting events from Garcia and other employees, and recorded them in a ''notepad,'' and collected or paid off on those bets, mostly during worktime and in work areas, and did so throughout 1991 and 1992. Garcia specifically recalled in this regard that Nguyen had solicited bets on a prize fight in the summer of 1992, and on the 1992 World Series playoff games, in September. Nguyen did not entirely deny Garcia's descriptions of his activities, but insisted that he ''quit doing that'' sometime in 1991. Later, however, he contradicted himself, admitting having bet with Garcia and other employees on a prize fight in the summer of 1992. Overall, he seemed to evade, trim, or equivocate. I found Nguyen's testimony on these matters quite unimpressive. Even after allowing for a seeming tendency on Garcia's part to exaggerate the frequency of his betting encounters with Nguyen, I would accept the substance of Garcia's testimony—that Nguyen regularly solicited employees to bet on sports events, maintained a notebook record of these bets, and paid off or collected on those bets, during working time and in working areas.

[*] Here, I observe incidentally, the General Counsel accepts that when Garcia said ''Khanh Nguyen,'' whom Garcia called the ''Plant Foreman,'' he really meant Khanh Nguyen, the plant manager. Prosecuting counsel's motion to ''correct'' the record only goes to instances where Garcia (and the attorneys who questioned him), although apparently referring to department ''foreman'' Hung Nguyen, also used the name ''Khanh Nguyen.''

have been known to Anderson, and therefore I could not find that he ''tolerated'' them.

I sum up the pertinent, credible evidence arguably supporting the General Counsel at this point, and make additional observations: Phanvongsa's and Nguyen's gambling activities obviously involved ''solicitations'' of a sort, but ones unrelated to the IUE or the preelection campaign, and they were not conducted by employees, but by two members of company management. This arguably reveals, favorable to the prosecution, that Nguyen and Phanvongsa, as members of the Company's management team, ''tolerated'' their *own* arguable ''violations'' of rule 8.[93] And we know that, despite the gambling activities of the two supervisors, Anderson sought on two occasions to curb supposed rule 8 violations involving election campaign activities by two employees, one prounion, one antiunion.

I find it difficult to draw an inference of proscribed ''disparate'' enforcement simply because Anderson remonstrated with Garcia—and equally with Sam Sao—over a violation of rule 8, but failed to curb Phanvongsa's and Nguyen's gambling activities, especially where Anderson was not shown to have been aware of them. To find for the General Counsel on this point would require me to hold that the ''above-the-law'' activities of two members of management somehow created a legal situation in which Anderson was powerless to tell *employees* (prounion and antiunion alike) he believed to be involved in election campaign activities violating rule 8 not to do it anymore. I think such a holding would be an unreasonably strained one on these slender facts. Proof of the gambling activities of Phanvongsa and Nguyen is not enough to establish that rule 8 had become a dead letter in daily plant life. Garcia's description of his August 24 session with Anderson clearly reveals that *he* believed that rule 8 still had meaning and vitality in the plant;[94] his only objection to Anderson's accusations was that they were inaccurate.

For all these reasons, I remain unpersuaded that Anderson's verbal warning to Garcia on August 24 had any reasonable tendency to ''interfere with, restrain, or coerce'' employees in the lawful exercise of their Section 7 rights.[95] I would therefore dismiss all counts in the complaint relating to this incident.

B. *August 24 Pay Increases*

1. Introduction; legal setting; burdens

At least since July 1990, and probably for years before then, Stanton has maintained what might loosely be called a ''three-tier'' pay system for its hourly employees at Stockton. Under this system, all inexperienced new hires start at the plant-wide ''Minimum'' hourly rate, without regard to their job classification. However, at intervals of roughly 30 days (assuming satisfactory performance), they get raises which bring them first to a ''Limited'' rate established for their particular job classification (denoting competence in the basic skills of the job), and eventually, to the ''Unlimited,'' or ''top'' rate established for their particular job.[96] Since 1990, on top of these rates, Stanton has paid a fixed hourly premium amount to employees with good attendance records, a premium known as ''attendance incentive pay.''[97]

On August 24, about 2 weeks after Stanton learned of the IUE's organizing drive, and only a few days after the IUE filed its election petition, Stanton granted and announced a 4-percent raise in hourly pay to all hourly paid employees at Stockton, in all job classifications, and at all pay levels. On the same date it also announced a raise of 5 cents in the attendance incentive premium. The General Counsel contends that both of these increases amounted to unlawful grants of benefits made to influence the outcome of the election. Stanton seeks a finding that the coincidence in the timing of the increases and the election campaign was just that and nothing more, because the increases were ''annual'' ones, granted and announced historically at roughly this same time each year.

The Supreme Court's 1964 decision in *Exchange Parts*[98] recognized,

> [t]he danger inherent in well-timed increases in benefits . . . the suggestion of a fist inside the velvet glove . . .

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[93] On examination by the General Counsel, Anderson agreed in general terms that the plant ''rules'' applied equally to supervisors, and this would permit a finding that rule 8 was ''violated'' by Nguyen and Phanvongsa when they took bets, or paid off or collected on those bets, on worktime and in work areas. On the other hand, I would not make too much of Anderson's generalized concession: If the ''rules,'' especially rule 8, *really* applied to ''supervisors,'' then I would be forced to conclude that the Company's preelection campaign meetings, conducted during worktime by Anderson and other company managers before a ''captive audience'' of workers, were equally ''violations'' of rule 8. Yet the General Counsel does not cite these campaign meetings as evidence of company tolerance of ''antiunion'' violations of the rule; nor am I aware of any Board precedent that would rely on the worktime antiunion campaign activities of supervisors or managers to find unlawful ''disparity'' in the enforcement of an otherwise lawful no-solicitation rule against an *employee's* violation of the rule. Put another way, we may presume, despite Anderson's generalized concession, that supervisors and managers were, at least for some important purposes, exempted from rule 8's proscriptions. And this makes it dubious at the outset to cite solicititation activity by supervisors or managers as evidence of proscribed disparate enforcement.

[94] ''I told him that I know what the rules are. And that I myself go around telling the rest of the committee for the union those same rules. Because I know what the rules are, and I stay with them.''

[95] The General Counsel devotes one sentence—a perfunctory and conclusionary one—to the claimed ''impression of surveillance'' violation pleaded in complaint par. 6(i)(3), supra. She states (Br. p. 21):

> Moreover, this [August 24] conduct by Respondent created the impression that Garcia's union activities were under surveillance.

I find that nothing in the credited evidence of what Anderson said to Garcia on August 24, nor even in Garcia's more embellished version, would reasonably support the claim that Anderson's remarks tended to create the impression that the Company was spying on employees' union activities, as distinguished from merely taking notice of them when they were conducted openly on the plant floor.

[96] These findings are based on a comparison and integration of information from Anderson's and Zurilgen's summary explanations of the pay system, the ''Wage Guidelines'' exhibits described below, and R. Exh. 16 (July 1988 ''benefits'' summary).

[97] Crediting Anderson, the attendance incentive pay program was started in 1990 at Stockton. Under this program, employees meeting a certain standard of attendance (apparently, ''perfect'' attendance) within a pay period receive extra pay for each hour worked in that period.

[98] *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

> the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.[99]

The sampling of cases discussed below leaves no doubt that the Board, inspired by the same recognition, will closely scrutinize increases in wages or other benefits conferred during an organizing or preelection period. It is somewhat less certain from the variety of formulations in the precedents, however, where the Board stands on more subtle questions affecting the allocation and nature of the parties' respective burdens of proof in cases like these. On brief, the General Counsel argues in this regard (emphasis added):

> The Board *presumes* that any increase in wages during an organizing campaign has been granted in an effort to influence the outcome. This presumption arises *automatically* on the showing of the increase[,] *without regard to effect or motive*. The burden then shifts to [Stanton] to establish a *legitimate business reason* for the timing of the increase.

In support of this understanding, the General Counsel cites, and accurately paraphrases, Judge Robert T. Snyder's interpretation of precedents in *Elston Electronics Corp.*[100] On exceptions to the Board, Judge Snyder's interpretations were apparently adopted by two members of the three-member deciding panel (Members Johansen and Higgins), but Member Cracraft, concurring in the result, ''[did] not adopt the judge's analysis that the announcement of a wage increase following commencement of an organizing campaign is presumptively unlawful.''[101] Rather, she would adopt the formulation stated in *Litton Industrial Products*,[102] as follows:

> Absent an affirmative showing of some legitimate business reason for the *timing*, it is not unreasonable to draw the inference of improper motivation and improper interference with employee freedom of choice.[103]

More recently, in *B&D Plastics*,[104] the Board likewise eschewed the term ''presumption'' when, characterizing a line of prior holdings, it spoke of an ''*inference* that benefits granted during the critical period are coercive,'' and construed those holdings as ''permitt[ing] the employer to *rebut* the inference by coming forward with an explanation, other than the pending election, for the *timing* of the grant or announcement of such benefits.''[105]

The *B&D Plastics* Board obviously prefers the term ''inference'' to the term ''presumption,'' but apparently finds it entirely reasonable to ''infer'' from the timing alone that a pay increase or other ''benefit'' announced or granted during a union organizing or preelection campaign will have ''coercive'' impact on voting unit employees. And this inference alone, seemingly, will sustain a finding of violation, unless the employer ''rebut[s] the inference by coming forward with an explanation, other than the pending election, for the timing of the grant or announcement of such benefits.''

I question whether there is much practical difference between a ''presumption'' of unlawful coercion and an ''inference'' of the same where, under either label, the employer is clearly put to a ''rebuttal'' burden once it is shown that it made a grant or announcement of benefits during a union organizing or preelection campaign. (Possibly the rebuttal of an ''inference'' requires a lower level of proof than the rebuttal of a ''presumption,'' but I see no clear instruction in the cases that this is so.) I will assume for purposes of further analysis that the General Counsel's initial burden of establishing a prima facie case of unlawful coercion was carried when Stanton admitted counts in the complaint alleging that the pay increases were announced and conferred on August 24, during the critical preelection period. I will further assume that it fell entirely to Stanton in these circumstances to ''provide an [innocent, credible] explanation . . . for the timing of [its] grant and announcement of the [increases].''[106]

Based on the undisputed facts narrated below concerning each of the two types of pay increases in question, I will find that Stanton, while failing to show an entirely uniform historical practice, has nevertheless adequately established that its August 24 increases were consistent with its having granted quite similar increases almost exactly a year earlier, and with a more general historical pattern of granting wage increases in July or August of each year. And I will therefore conclude

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[99] Id. at 409.

[100] 292 NLRB 510, 525–526 (1989), citing several cases, including *Village Thrift Store*, 272 NLRB 572 (1983), where the Board implied a ''presumption'' of sorts when it said (emphasis added),

> A grant or promise of benefits made during an organizational effort *will be considered unlawful unless the employer can provide an explanation*, other than the organizational activity, for the timing of the grant or announcement. Thus, the Board requires that an employer show by objective evidence that it would have made the same grant or announcement of benefits had the union not been present. [Ibid. citing *Singer Co.*, 199 NLRB 1195, 1196 (1972), enfd. 489 F.2d 269 (10th Cir. 1973).]

[101] 292 NLRB 510 fn. 2.

[102] 221 NLRB 700 (1975), enf. denied 543 F.2d 1085 (4th Cir. 1976).

[103] Quoting *Litton*, supra, 221 NLRB at 701; emphasis in original.

[104] *B&D Plastics*, 302 NLRB 245 (1991).

[105] 302 NLRB at 245; my emphasis. For another formulation of the employer's rebuttal burden, see, e.g., *Village Thrift Store*, 272 NLRB 572 (1983):

> the Board requires that an employer show by objective evidence that it would have made the same grant or announcement of benefits had the union not been present. [Ibid.] [*]

[*] Citing *Singer Co.*, 199 NLRB 1195, 1196 (1972), enfd. 489 F.2d 269 (10th Cir. 1973) (''a grant or promise of benefits made during an organizational effort will be considered unlawful unless the employer can provide an explanation, other than the organizational activity, for the timing of the grant or announcement.'').

[106] It is clearly also part of the employer's burden in appropriate cases to demonstrate that the ''size'' or ''amount'' of even an otherwise innocently ''timed'' increase would have been the same, absent the pendency of an election or an organizing effort. E.g., *B&D Plastics*, supra, 302 NLRB at 245, listing ''the size of the benefit conferred in relation to the stated purpose for granting it'' as one of four ''factors'' the Board examines ''to determine whether granting the benefit would tend unlawfully to influence the outcome of the election.'' See also *Village Thrift*, supra, imposing ''require[ment]'' that employer ''show by objective evidence that it would have made the *same* grant or announcement of benefits had the union not been present.'' 272 NLRB at 572; my emphasis. Here, although I find nothing in the General Counsel's arguments that might be taken as an independent attack on the ''size'' of the August 24 increases, I will consider this element in reaching my ultimate conclusions.

that this proven history amounts to a plausible ''explanation, other than the pending election,'' for the August 24 increases, one which also makes it unlikely that employees would see the August 24 increases as attempts by Stanton to buy their votes in the forthcoming election.

2. Details

a. *Percentage increases in basic hourly pay*

The 4-percent, across-the-board raise was made known to employees on August 24, when Zurilgen posted a new ''Wage Guidelines'' notice on the plant bulletin boards. That bulletin listed all ''hourly'' job classifications, and the new rates to be applied to each position, ''[e]ffective August 24.'' When Zurilgen posted this bulletin, she simultaneously removed a counterpart ''Wage Guidelines'' notice bearing the effective date ''August 26, 1991,'' which had been posted throughout the previous year, and which reflected the wage rates governing during that year. The August 24 bulletin made no mention of the organizing campaign, nor the pendency of the election petition, both of which were by then known to Stanton. Indeed, the bulletin was no different in general layout and content from similar ''Wage Guidelines'' bulletins previously issued, as further described below.

From Anderson, echoed in part by Zurilgen, I find that for many years, Stanton's corporate-level officials in Portland typically reviewed hourly pay levels once each year, in the June–August period, and authorized Anderson to announce increases pursuant to these reviews, usually in July or August. (From Zurilgen, I find that Stanton traditionally publicized these annual increases by posting a new ''Wage Guidelines'' bulletin, and removing the old one, just as Zurilgen had done on August 24.) Anderson testified that the same review and announcement process was followed in the summer of 1992 that had been followed in previous years.[107] More specifically, Anderson testified that he had asked ''Corporate'' in or about June for permission to make an ''across-the-board'' increase, without recommending any percentage amount, and finally got written authorization on August 18 to grant a 4-percent raise, an authorization that also included instructions to Zurilgen to record the raise on employees' paycheck statements as an ''annual increase.''[108]

Stanton introduced copies of two previous ''Wage Guidelines'' bulletins, the one already described, showing wage rates ''Effective August 26, 1991,'' and another one showing no ''effective'' date, but bearing the handwritten note, ''July 1990.'' This latter exhibit, I find, reflects the new wage schedule arrived at in or about July 1990, and made ''effective'' either in July or August of that year.[109] By comparing a sampling of wage rates for the same jobs listed in each of these two exhibits, I find that the August 26, 1991 raise had also been a 4 percent one, but one applied only to persons above the starting, or ''Minimum'' pay level.[110] I cannot make a similar comparison to determine the percentage increase in wages reflected in the ''July 1990'' exhibit, because it is the most historically remote one introduced by Stanton, and there is no other evidence of the wage rates being paid immediately before the rates shown on that exhibit went into effect.[111]

b. *Increases in the attendance incentive premium*

The attendance incentive increase of 5 cents per hour (raising the incentive premium from 35 cents per hour to 40 cents) was announced by Anderson in a separate memorandum, ''To All Hourly Employees,'' also dated August 24, and also posted on the bulletin board. From Anderson, I find that he had specifically recommended the 5-cent incentive

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[107] Testimony as follows:

A. MR. ANDERSON: Okay. First, since I come down to Stockton, I have given a raise, or looked at the wages and started working on wage increases, always around June, July and August, since I've been there.

Q. MR. CARTER: What steps do you go through?

A. MR. ANDERSON: Well, I start working with Corporate usually around in June. So that I'll try to have the raises by July, but sometimes it fades into August. So, I work with them. And we come up with different figures and stuff like that. And they usually give me the go ahead, ''Go ahead Bob we approve it.''

Q. MR. CARTER: Okay. And that's the process you went through in 1991?

A. MR. ANDERSON: Yes.

Q. MR. CARTER: And is that the process you went through in 1992?

A. MR. ANDERSON: Yes.

[108] Anderson authenticated a document, R. Exh. 27, as a rough-form internal memo he received from headquarters on August 18, authorizing the ''annual increase'' in question. He recalled further that when the ''4 percent'' figure was arrived at by headquarters officials, they explained it to him as being in line with the most recent year's percentage increase in the ''cost of living.'' Stanton made no attempt further to particularize or rationalize the amount of the raise; the prosecution made no attempt to show that the rise in the ''cost of living'' during the relevant period was *not* 4 percent.

[109] Neither Zurilgen nor Anderson was certain of the exact date of the posting of the ''July 1990'' bulletin. Zurilgen stated, ''I would assume it was effective in August but I can't actually tell you. We always do it the same time.'' Zurilgen, the custodian of these records, identified the ''July 1990'' handwriting as that of the office manager, Marla Yagi, and speculated that Yagi made that notation after the guidelines were printed, but possibly before the guidelines were posted. I am satisfied from Zurilgen's testimony that the 1990 guidelines were posted in either July or August 1990. I cannot see how it might affect the result to determine the question of timing more precisely.

[110] Thus, ''Minimum'' pay under the ''July 1990'' guidelines bulletin was $4.50/hr., and this rate did not change in the August 26, 1991 guidelines bulletin, but it did increase by 4 percent, to $4.68/hr., in the August 24, 1992 guidelines bulletin. This is Anderson's explanation why, in August 1992, unlike in August 1991, the Company had included ''Minimum'' pay levels in the 4-percent increase:

A. MR. ANDERSON: Yes. I changed that and moved it up the ladder. I asked him, because to see if it would help us get people, we were hiring people, you know give them more money when they start. See if we can get, you know, more people to want to get in there and go to work right away.

Q. MR. CARTER: Were you having trouble at your other rates and—

A. MR. ANDERSON: Yes.

Q. MR. CARTER:—hiring new employees?

A. MR. ANDERSON: Yes we did, yes.

[111] A ''Benefits'' summary sheet, dated July 12, 1988 (R. Exh. 16), indicates that the ''minimum starting wage'' was *then* ''$4.25 per hour.'' The ''July 1990'' exhibit shows that the ''Minimum'' rate was $4.50. It is therefore clear that at some point or series of points between July 1988 and July 1990, ''Minimum'' pay had been bumped up by 25 cents.

raise in earlier discussions with ''Corporate'' officials,[112] and received authorization on August 18, at the same time he was given the go-ahead to confer the 4-percent, across-the-board hourly pay increase.

In his August 24 memorandum, Anderson stated that the increase was being given ''in hopes that there will be a lower percentage of tardiness and absenteeism.'' He also noted an ''improvement in [employees'] individual attendance,'' and exhorted employees to help the Company achieve its ''goal of perfect attendance each pay period.'' Finally, he announced his intention to ''re-evaluate this program in July 1993 at which time I hope to see an even greater improvement . . . .''

On August 26, 1991, Stanton had raised the attendance incentive premium by 10 cents, from 25 to 35 cents. And Anderson had likewise announced this 1991 increase by the device of a ''Memorandum to Employees,'' dated August 23, 1991, which was nearly indistinguishable in format and content from Anderson's August 24, 1992 memorandum. Most notably, in the August 23, 1991 memorandum, Anderson had announced:

> I will be re-evaluating this program in July 1992. At that time I hope to see an even greater improvement.

3. Concluding analyses

As to the 4-percent hourly raise announced and granted on August 24, I find from all of the foregoing that employees would reasonably anticipate that Stanton would announce new ''Wage Guidelines'' annually, in July or August. Thus, setting aside for the moment the ''size'' or scope of the August 24 increase, I find it unlikely that the posting of new ''Wage Guidelines'' on August 24, standing alone, would arouse employees to suspect an election-related attempt by the Company to buy their votes. I have a similar reaction concerning the 5-cent raise in the attendance incentive premium, also announced on August 24. Thus, roughly a year before the IUE appeared on the scene, Anderson had raised the incentive premium by 10 cents an hour, and had issued a memorandum which promised a July 1992 review of the incentive premium, and which implied that the premium might be raised again if overall attendance improved. Because of this I again find it doubtful that employees would be surprised by Anderson's August 24 annnouncement and grant of an increase in incentive pay, or that they would see it as having been inspired by the IUE's recent appearance on the scene.

The General Counsel concludes the portion of her brief dealing with the wage increases with this argument (Br. pp. 23–24; emphasis in original):

> The most critical element . . . is the fact that [Stanton] did not actually make the decision to grant the wage increase until *after* it had knowledge of the organizing campaign. At that point [Stanton] could have lawfully chosen to defer the increase and even advise the employees it was doing so until the campaign was over in order to avoid the appearance of any interference. Rather, [Stanton] chose to grant the increases just two weeks after the Union's open announcement of its . . . campaign and despite the absence of any historical precedent for such increases in August.

The General Counsel's implicit argument is that Stanton, aware by August 24 of the IUE campaign and the pending election petition, owed—and violated—a statutory *duty* to ''defer the increases,'' at least where there was no ''historical precedent for such increases in August.'' If, indeed, there had been no ''historical precedent'' for the August 24 increases, then there might exist some indirect support in the cases for the General Counsel's suggestion that Stanton owed a duty to defer them until after the election.[113] But in fact, there was historical precedent for the granting of both percentage wage increases and attendance incentive pay increases, ''in August.'' Clearly, both types of increases had been granted and announced almost exactly a year earlier, when no union was in the picture. And the amounts of the 1991 increases were not *suspiciously* different from those granted and announced on August 24, 1992.[114] Moreover,

[112] On cross-examination, Anderson elaborated as follows:

A. MR. ANDERSON: Yes. I told them I'd like to raise it another five cents. That it's good. That it's working for the people, and it's working good for us.

Q. MS. MARCOTTE: And what factors did you consider when you decided to propose a nickel increase?

A. MR. ANDERSON: Just kind of off the hip I guess. I mean, I want to give them another nickel, and they okayed it.

[113] Judge Snyder's discussion of this point in *Elston Electronics*, supra (292 NLRB at 526), cited by the General Counsel, itself cites *Village Thrift Store*, supra. In *Village Thrift*, the Board recognized the existence of a potential ''Hobson's choice'' problem for an employer who, in the past, had granted benefits in a ''haphazard fashion,'' and who therefore could not ''show by objective evidence that it would have made the same grant or announcement of benefits had the union not been present.'' Id. 272 NLRB at 572. And in that context, the Board found it legally privileged for the employer to have announced in November, shortly after the union had filed an election petition, that wages would be ''frozen'' pending the resolution of the union matter. Ibid.

[114] Although the General Counsel does not emphasize these facts, I note that the August 24 increases differed from the August 1991 increases (the 1991 increases) in two ways, described below, and therefore the August 24 increases were not *entirely* ''consistent'' with the ''precedent'' established by the 1991 increases: Thus, the 1991 boost in attendance incentive pay had been 10 cents, whereas the counterpart incentive increase granted on August 24 was only 5 cents. But this does not aid the prosecution, for it tends to negate any ''inference'' that the August 24 incentive increase was intended by the Company, or would be seen by employees, as an unprecedented display of generosity. Cf. *B&D Plastics*, supra, 302 NLRB at 245. On the other hand, however, the 4-percent across-the-board raise in hourly pay granted on August 24 applied to *all* pay levels, whereas the 1991 increase of 4 percent had not applied to the ''Minimum'' pay level of $4.50/hr., which remained the same as it had been in 1990. To that extent, the challenged August 24 raise of 4 percent was truly an ''across-the-board'' one, whereas the 1991 counterpart raise had been somewhat more limited in scope. But the arguable ''generosity'' on the Company's part in applying the August 24 increase to the ''Minimum'' pay level is of doubtful help to the prosecution. It was adequately ''explained'' in terms ''other than the pending election'' by Anderson, who noted simply that the ''Minimum'' pay level had remained fixed for 2 years at $4.50, thus making it plausible that the Company would have determined in August 1992 in the interests of wage competitiveness alone to apply the 4-percent raise to the Minimum pay level. (I recall too, as previously noted, that ''Minimum'' pay had been raised at least once in the past, sometime between July 1988 and July or August 1990.) In any

Continued

documentary evidence shows that in either July or August 1990, Stanton had likewise established new pay levels, announcing them by the posting of the familiar ''Wage Guidelines'' bulletins. Given those precedents, I disagree with the General Counsel that it is an ''element'' of ''central'' significance that Stantons's knowledge of the IUE's presence preceded its actual granting and announcement of the increases in question. Rather, for reasons already stated, I think this overall history was sufficient to rebut any inference of coercion based either on the timing or amounts involved in the August 24 grant and announcement of the increases.[115] I will therefore recommend dismissal of the complaint insofar as it alleges that these increases were unlawful.

C. *Other Allegedly Unlawful ''Improvements''*

Relying on the same legal theory and mode of analysis involved in its attacks on Stanton's wage increases, the General Counsel further alleges, at paragraph 6(f) of the complaint, that Stanton ''[i]mplemented improved terms and conditions of employment in order to discourage employees' support for the [IUE] by:

> (1) On or about September 23, 1992, announcing a revised payroll check system to highlight incentive pay amounts;
>
> (2) On or about October 9, 1992,
>
> (i) Changing the payroll check distribution system;
>
> (ii) Changing its mandatory overtime policy and otherwise improving its preconditions for employees to receive incentive pay bonuses.

Stanton does not deny having made ''revis[ions]'' and ''change[s]'' roughly of the types described in paragraph 6(f), nor even that these changes reflected ''improvements'' from the employees' standpoint, but it denies the motivations imputed to it in this paragraph. Stanton argues that each of these changes were de minimis in character, and therefore were not unlawful, but it nevertheless offered ''explanations, other than the pending election,'' for having made each of those changes. The pertinent facts regarding these changes are relatively simple and almost entirely uncontested. I will find that these changes were, indeed, so minimal in their import that they would not realistically convey to employees the proscribed ''suggestion of the fist inside the velvet glove.'' Alternatively, even if the timing of these changes might faintly raise such an inference, I would find that Stanton's explanations adequately rebutted it.

1. Change in paystub breakdowns

When Stanton handed out paychecks for the payroll period ending September 19, the checkstubs were in a new format. In addition to showing the number of regular and overtime hours worked by the payee, the stubs broke out in a separate column the amount the worker had earned in attendance incentive pay during the payroll period.[116] Everyone agrees that this new format did not in any sense ''change'' the hourly pay or incentive pay employees would actually receive, it only changed the layout of the paystub they got.

On September 23, Anderson publicized and explained these changes in a memorandum to all employees, stating in pertinent part as follows:

> In the last few months I have received several complaints about the attendance incentive. In hopes to make it more understandable I have asked payroll to make some changes so that it will be more simple to understand. . . . We have taken your regular and overtime hours and figured them at your regular base wage. Then we have figured your attendance incentive wage (40 cents per hour for your regular hours and 60 cents per hour for your overtime hours) and entered that figure in the incentive column on your checkstub.

The memorandum also included a specimen checkstub as an ''example'' of the new format, and a closing invitation to employees to see ''Pam'' [Zurilgen] if they had any ''questions'' about the new format. In addition to posting this memorandum, copies of it were distributed at employee meetings called by Anderson in the same period. In these meetings, Anderson repeated messages similar to those set forth in his memorandum.[117] There is no evidence, other than the timing of the change itself, suggesting that Stanton tried to make election campaign hay out of this change.

Zurilgen testified that employees often came to her in the past with questions about the way their attendance incentive premium pay was figured.[118] She also confirmed that such

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case, the record suggests that only a relative few of the hourly employees at any given point would be receiving ''Minimum'' pay, i.e., only those employees who had not yet completed 30 days of work. Thus, the inclusion of the ''Minimum'' category in the 4-percent raise on August 24 was unlikely to have had impact on any but a small number of workers, and to that extent, this inclusion alone was too subtle and marginal to give rise to an ''inference'' of improper motive on the Company's part, or of ''coercive'' impact on the unit employees.

[115] Despite the absence of documentary corroboration of pre-1990 ''practice,'' I found Anderson's and Zurilgen's uncontradicted descriptions of the Company's historical pattern of granting annual pay increases in July or August sufficient to establish that such a generalized practice existed. But Stanton's judgment not to introduce ''Wage Guidelines'' or other records showing details of pay practices prior to 1990 makes it impossible to know those details. For this reason I would not assume that the *amounts* of pre-1991 annual raises in wages were similar to those shown to have been granted in 1991 and 1992. However, such pre-1991 details, whatever they were, would be of little ultimate significance in this case, because of their historical remoteness. Put another way, I find that the documented evidence revealing that the Company had granted increases by no later than August in the 2 years preceding its challenged August 24 increases was the most centrally relevant evidence of a ''precedent'' for the August 24 increases, because it shows what the Company had done more recently, but still at a time when there was no union in the picture.

[116] The record fails to indicate exactly how the previous paystubs looked, but Zurilgen testified that, previously, the attendance incentive pay had been obscured within a single, ''total'' pay figure.

[117] I credit Anderson that he invoked employee ''confusion'' about incentive pay calculations when he talked about the paystub change in employee meetings. No one contradicted him; and employee Lewis Garcia agreed that in the meeting he attended, Anderson explained that the paystub layout had been changed because of such employee confusion.

[118] Thus,

> They would come to my office. I'm [in charge of] payrolls, and they would come to my office and I would help them go over

questions had emerged during ''employee meetings in August.'' (Whether these were ''campaign'' meetings, or meetings called for other purposes is not clear.) But she further volunteered that there had ''always been confusion'' among employees about how the Company calculated incentive pay.

The complaint emphasizes that the new paystub format was designed to ''highlight'' the incentive pay amount, and of course, Stanton substantially admits this in its explanations for the change. But is it the ''highlighting'' alone that the government attacks? Apparently not, for on brief, the General Counsel is more explicit as to the prosecuting theory of violation when she states in the heading to her argument, ''[Stanton] Revised its Payroll Check System to Highlight its *Unlawfully Granted* Incentive Increase.''[119] I have found that Stanton's August 24 increase in the incentive premium was legally innocent; obviously, therefore, the complaint cannot be sustained to the extent it depends on a contrary finding.

In addition, however, prosecuting counsel seizes on Zurilgen's concession that employees had ''always'' been ''confus[ed]'' about incentive pay calculations, and she thus finds it significant that Stanton nevertheless ''chose to wait and not respond to the complaints or attempt to allay any confusion until an organizing campaign was underway.'' I am not persuaded by this latter point. First, regardless of the timing, I think this act of ''responding to the complaints'' by clarifying earnings breakdowns on the paystub cannot reasonably be characterized as a ''grant'' of a ''benefit.'' Second, and relatedly, even if understood as a ''benefit,'' this revision in the checkstub was too subtle to have had any reasonable tendency to ''coerce'' employees in the exercise of Section 7 rights, or to influence the outcome of the election. Third, consistent with Anderson and Zurilgen's summary explanations, the timing of the paystub format change came 3 weeks after Stanton's (lawful) change in the amount of the incentive premium, a change which would plausibly trigger a new round of employee confusion when these increases began showing up on the next paychecks, and equally plausibly, would explain Anderson's mid-September choice to seek to allay this confusion by ordering a change in paystub format and by issuing an explanatory memo. Thus, even if this otherwise innocuous ''change'' invites a full-blown ''grant-of-benefit'' analysis, I would find that Stanton has adequately explained it in terms ''other than the pending election.''

2. Change in distributing paychecks

On a payday in early October, Stanton admittedly began a new practice at Stockton of handing out pay checks to employees minutes before the end of the work shift, while they were still on the clock, at their work stations. Previously, at least at the Stockton plant, employees had gotten their paychecks only after clocking out at the end of their shift, by joining a line near the plant exit. This meant that employees might have to wait an extra 5 to 15 minutes after punching out before they had their paychecks in hand. All witnesses testifying concerning this historical, ''off-the-clock'' pay practice agreed that this was inconvenient for the employees, and created management problems, as well, because a bottleneck would develop near the plant exit door.

According to Anderson, who authorized the early October change, this new check distribution system brought Stockton's practice into line with other Stanton plants Anderson was familiar with, including its Portland plant, which Anderson had earlier managed. Why, then, had Stockton persisted in its off-the-clock system until early October? Because, according to Anderson, that was what plant manager Nguyen had always wanted, despite Anderson's earlier suggestions that the practice might be changed.[120] However, says Anderson, after Nguyen was transferred to the Phoenix plant on October 2, Gonzales, his successor, told Anderson he preferred an on-the-clock distribution system.[121] Thus, according to Anderson, he deferred to Gonzales' preference for a new system, just as he had previously acquiesced in Nguyen's preference for a different system.

My reactions to this evidence are nearly identical to those I expressed in my previous discussion of the September change in the format of the pay stubs. The change in how paychecks were distributed was so minimal in terms of its ''benefit'' to employees that I doubt that its timing alone would justifiably support an inference of 8(a)(1) coercion or election interference. And even if a weak inference of coercion was created by the timing of the change, it was adequately rebutted by Anderson's (and Gonzales') counterexplanation for the timing.

3. Lifting of mandatory overtime

Normally, when Stanton required overtime work to keep current on its production schedule, it sought out volunteers. However, if volunteers were not available in sufficient numbers to meet production demands, Stanton would impose a period of ''mandatory'' overtime, where, without regard to employee preference, employees would receive specific instructions, in the form of posted overtime work schedules, that they were required to put in overtime hours. In late July or early August, before the IUE made its organizing presence known, Anderson had decided to impose a new period of mandatory overtime. He explained from the witness stand that,

> we had a new customer in Montgomery Wards. And we were so far behind that we were just about ready to [lose] the account. And we had so much business, at that time and I was also hiring people, but couldn't hire them fast enough and that's when I threw in that we

it. If for instance, one pay period they earned the incentive but the next one they didn't, they would get confused thinking that their hourly rate had dropped. And so I would go through it with them and explain it to them.

[119] G.C. Br. p. 32; added emphasis. Similarly, the General Counsel's principal ''position'' stated on brief beneath that topic heading is that the prior ''grant [of the 5-cent-per-hour wage increase] was unlawful because it was made in an attempt to influence the organizing campaign.''

[120] Anderson stated that he had once talked to Nguyen about making a change to conform to the on-the-clock practice at Stanton's other plants, but Nguyen had opposed this, because he feared that this would effectively curtail production for the remainder of the shift, as employees stopped working, removed their checks from the pay envelope, and inspected them.

[121] Gonzales substantially corroborated Anderson on this point. He also confirms that he had attempted in the past to get Nguyen to change to an on-the-clock distribution scheme, but that Nguyen had turned a deaf ear.

> had to go into mandatory overtime in order not to [lose] the account.

He announced this decision on August 4, in a posted memo to employees, saying that a recent ''increase of orders from our customers . . . has forced us to call for mandatory overtime.'' He ''recognize[d] that this is a sacrifice for many of you[,]'' and expressed ''regret [for] any inconvenience that this has made for you and your families.'' He explained that mandatory overtime would become ''effective'' on August 10, and that overtime schedules and lists would be ''posted in advance as such[,]'' and that ''[m]andatory overtime will be considered as regular scheduled work time.'' He warned that ''if any mandatory overtime is missed, you will [lose] your attendance incentive.'' However, he also appeared to suggest that the Company would be flexible about this, for he stated, ''Therefore, it will be important that you notify your Supervisor, Khan [Nguyen] or myself if you are unable to work the scheduled overtime.''

On the witness stand, Anderson vaguely agreed with the suggestion of Stanton's attorney that, sometime in ''October,'' he ''backed off of the mandatory overtime.'' He explained that this actually began to happen in ''September,'' when ''we got caught up, got ahead, and the back log had come down to where I wasn't in jeapordy of [losing] the account.'' He states that he made no ''written announcement'' when he decided thus to ''back off of'' mandatory overtime, but ''just tapered off'' the overtime assignments ''as . . . our backlog started coming down.'' He explained further that until then, employees ''knew . . . we would need them for ten hours a day . . . unless we notified them that, ''Hey, you can go home and stuff like that, which we did.'' Eventually, says Anderson (without being specific about the date), the need for overtime work had tapered down to the point where ''we finally . . . just took the sign [the August 4 notice] down[,]'' and thereafter reverted to seeking out volunteers for any needed overtime.

Thus, from Anderson's account, it appears that the lifting of the mandatory overtime regime occurred rather gradually and undramatically, without particular fanfare, or formal ''announcement'' of any kind. However, the General Counsel sees it differently. Thus, in what I think amounts to a substantial exaggeration of the record, she asserts on brief (emphasis added):

> In *early October*, at about the same time that the method of distributing paychecks was changed, [Stanton's] supervisors informed employees that they would *no longer be required to work overtime* in order *to be eligible for the attendance bonus*.

And this supposed pattern of activity by Stanton's ''supervisors'' in ''early October,'' becomes fuel for a later argumentative observation by the General Counsel. Thus, discussing Anderson's explanations for ''tapering off'' in ''October'' from the original mandatory overtime regime, she states (emphasis added):

> No explanation was offered, however, as to why [Stanton] deemed it necessary to *announce* the *change* to employees *at that particular time*, just a few weeks before the election.

Critical elements in these assertions and arguments have no reliable evidentiary predicate. In fact, the only evidence cited by the General Counsel concerning such alleged ''announce[ments]'' by ''supervisors'' is the testimony of Garcia, about a single exchange with his supervisor, Niemi, which Garcia was somehow able to recall took place on ''about the 9th of October, more or less.'' In this conversation, says Garcia, Niemi,

> told me that from now on, if there's overtime hours to be worked, but if I need to leave early, just let him know in advance and that from now on I wouldn't lose my incentive pay for leaving early when they request overtime.

Setting aside doubts about the literal accuracy of Garcia's account of the timing and substance of Niemi's remarks, I observe that Garcia does not support the General Counsel's assertion that, in this instance, Niemi ''informed''—much less ''announced'' to—employees that they would *no longer be required to work overtime* in order to be eligible for the attendance bonus.'' At most, Garcia's account would allow a finding that Niemi told Garcia that he would be excused from mandatory overtime, without prejudice to his eligibility for incentive pay, if, (a) he ''need[ed] to leave work early,'' and (b) he ''let [Niemi] know in advance'' about that need. And I further observe that this statement by Niemi did not distinctly signal a ''change'' in the policy announced originally in Anderson's August 4 memorandum. Thus, in that memo Anderson told employees, ''it will be important that you notify your Supervisor, Khan [Nguyen] or myself if you are unable to work the scheduled overtime,'' implying that being ''unable to work the scheduled overtime'' would not count against the employee when it came to the attendance incentive, so long as the employee notified a supervisor or manager about such inability. In sum, Niemi's statement to Garcia can rather easily be harmonized with the existing mandatory overtime rules, and I would more readily understand Niemi's remarks, as described by Garcia, as an interpretation of existing policy, not the ''announcement'' of a reversion to a ''voluntary overtime'' regime.

The General Counsel has failed to present substantial evidence that Stanton used ''supervisors'' to ''announce'' a lifting of the mandatory overtime rule ''in early October.'' I do not doubt Anderson's testimony that the mandatory overtime regime withered and fell away by pieces, and that the Company took no special pains to ''announce'' this quite gradual process of reversion to the pre-August 4 status quo. I note further that it was hardly unprecedented for the Company to require mandatory overtime, and later to withdraw that requirement when the need no longer prevailed. Thus, it could have come as no surprise to employees that the mandatory overtime regime first announced by Anderson on August 4 as something ''required'' to meet an ''increase in orders from our customers'' would eventually be withdrawn, when the Company caught up with the new orders. For these reasons, I would find it quite unremarkable, and no grounds for an inference of ''coercion'' that, months after this particular period of mandatory overtime was first imposed, the Company began gradually to limit mandatory overtime assignments, and finally reverted entirely to the voluntary system prevailing in the pre-August 10 period. And again, even if

the timing of this indistinct process of phasing-out mandatory overtime might arguably invite such an inference, I would find that Anderson has credibly explained the phaseout in terms that had nothing to do with the pending election. I would therefore dismiss this count alleging unlawful ''improvements,'' as well.

D. *Anderson's Alleged Threat in a Speech that Strikers Would Lose Their Jobs*

Paragraph 6(d) of the complaint charges that,

> On or about late September 1992 or early October 1992, acting through Anderson, [Stanton] threatened that if employees went on strike they would be replaced and not rehired.

Lewis Garcia, again the General Counsel's sole witness, recalled that, during a campaign speech ''around the first week in October,'' delivered to about 35 employees, Anderson,

> mentioned that people that are striking can be laid off, or replaced actually is what he said. He said they can be replaced. And there was nothing in the law that says that they have to hire you back if you're replaced.

Garcia was admittedly vague in his memory of the balance of Anderson's remarks, but recalled that Anderson's statements were made while he was also displaying slide projections, and that Anderson ''did read from a paper, yes. He did have a paper.'' Anderson, substantially corroborated by Zurilgen, testified that he used a prepared, typed script for all of his speeches, and that he ''read that script word for word.'' The pertinent portion of a script identified by Anderson, which the parties stipulated Anderson used during a speech to employees on October 6, says this:

> You may wonder what would happen to your jobs if you went out on strike. The answer is that you can be permanently replaced while you are out on strike. So ask yourself is it worth the chance that you may have to decide to go out on strike and be permanently replaced just because the union has made promises—promises that they may not be able to keep.

Noting that this script was used on October 6, and that Garcia was referring to a meeting around that date, I find that Anderson used this script in the meeting described by Garcia. The General Counsel's countersuggestions are based on plain speculation.[122]

The General Counsel does not attack the scripted remarks,[123] but urges me to find that the version Garcia reported was (a) what Anderson really said, and (b) was an unlawful misstatement of striking employees' rights under *Laidlaw*.[124] I would not rely on Garcia's uncorroborated recollections to find exactly what Anderson actually said. It is more probable than not on this record that Anderson did, indeed, follow the script in the meeting Garcia described, and that Garcia blended his subjective understanding of the import of Anderson's remarks with what he actually recalled Anderson said on the subject of striker replacements. For this reason, I do not decide whether Garcia's version of Anderson's remarks contains an express or implied ''threat . . . that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with *Laidlaw*.''[125] Rather, I would dismiss the complaint count in question for want of reliable proof that Anderson went beyond what the precedents allow him to do, i.e., ''truthfully inform[ ] employees that they are subject to permanent replacement in the event of an economic strike.''[126]

E. *Alleged Grievance-Solicitation Activity*

The complaint alleges at paragraph 6(e) (emphasis added):

> On different occasions in October 1992, acting through Raines [previously identified in the complaint as ''Keith Raines''—actually, ''Raine''—Stanton's corporate ''president,''[127] Pham [previously identified as Duong Pham, a Stockton department ''supervisor''], *or Nguyen* [the antecedent reference is unclear],[128] solic-

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[122] On brief (p. 27), the General Counsel states (emphasis added):

> Anderson was unable to testify with *certainty* that the subject of strikes or strike replacements was *not again* discussed at any of [the other meetings where Anderson said he had used different scripts]. Thus it is *entirely possible* that the speech which Garcia testified about *was one of the other speeches* delivered by Anderson.

''Possible''? Perhaps remotely so. But given the stipulation that the script was used in the October 6 meeting, and Garcia's own similar memory of the timing, the prosecution's burden was to prove that it was nevertheless *probable*, i.e., more likely than not, that Garcia was describing a meeting other than the October 6 meeting. This the prosecution made no attempt to do.

[123] And see, e.g., *Eagle Comtronics*, 263 NLRB 515, 516 (1982), characterized by the Board in *Gibson Greetings*, 310 NLRB 1286 (1993), as a case where,

> The Board . . . reiterated the principle that an employer does not violate the Act by truthfully informing employees that they are subject to permanent replacement in the event of an economic strike.

[124] *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969).

[125] *Eagle Comtronics*, supra at 516.

[126] *Eagle Comtronics*, supra; *Gibson Greetings*, supra.

[127] The record otherwise shows that ''Raines'' actually spells his name ''Raine,'' and that he is also the owner of Stanton.

[128] Because the complaint had previously identified two Nguyens (Plant Manager Khanh Nguyen, and Department Supervisor Hung Nguyen), it was facially impossible to know which of these Nguyens was being accused in this count. And the question only became further confused when witness Garcia, and the lawyers questioning him, used the name ''Khanh'' Nguyen when describing alleged grievance solicitations made by someone he otherwise described as a ''foreman . . . between the upholstery and assembly line.'' Garcia was apparently describing Upholstery Supervisor Hung Nguyen. And it is clear that Stanton's counsel understood the complaint's reference to ''Nguyen'' here as a reference to Hung Nguyen. Thus, on brief (p. 14, par. 2) Stanton's attorneys say,

> In the complaint, Paragraph 6(e) states that the owner of the Company, Keith Raine, and two supervisors, *Hung* Nguyen and Duong Pham, solicited grievances . . . .

Moreover, despite Garcia's mistaken references to ''Khanh'' Nguyen, Stanton's lawyers apparently assumed that he was actually referring to Hung Nguyen, for they called Hung Nguyen to dispute Garcia's claims in this regard, but called *Khanh* Nguyen for different purposes. And in these circumstances, I regard it as merely coy on Stanton's attorneys' part that, later in their brief (p. 15, second full

Continued

ited the grievances of employees and promised to remedy said grievances in order to discourage employee support for the [IUE].

The General Counsel's case here depends on the literal accuracy of employee Say Plork's memory of statements made by Raine during a meeting with employees on October 27, and on the substantial accuracy of Lewis Garcia's highly impressionistic summaries of seemingly scores of alleged encounters over several weeks between himself and Department Supervisor Hung Nguyen,[129] in which Department Supervisor Duong Pham also allegedly participated on a few occasions.

Stanton did not bring Raine to the witness stand to contradict Plork, nor did it question Anderson nor Gonzales, alleged by Plork to have been present at the October 27 meeting, about what happened at this meeting. But it called Supervisors Hung Nguyen and Duong Pham to deny ever having made or witnessed the ''solicitations'' and ''promises'' described by Garcia. For different reasons in each case, I would not rely on either Plork or Garcia to find a prima facie case.

1. Company owner Raine's statements on October 27, as described by Plork

Plork, one of the employees named on the IUE's August 10 letter to Anderson as a member of the organizing committee, said that he attended several meetings, perhaps five in all, where company officials spoke to employees about the pending election. While he could not recall the dates of these other meetings, he was somehow able to recall that the one now in question occurred on October 27. He stated that ''about 30'' other employees attended, and that over the course of about ''20 minutes,'' Raine spoke (in English), while Anderson and Gonzales stood by, Gonzales silently, and Anderson mostly so.[130] Claiming to recall ''[n]ot everything, but most things,'' this is Plork's rendition of what Raine said:

> Well, Mr. Raines [sic] started with like talking about, well, his word he said, I understand there's a union election coming up on October 30th. And I understand what you want. But we want you to understand us too. And he said I don't want to tell you how to vote. We'll respect your vote. But voting no is a better answer for everybody. And I can't promise you anything right now, but now that I know what your problem is, things are going to be better. And he said that the company is growing so good now. I mean he said, I want you to know that the company is growing so good. And this is the best company we have. And that's all I can remember.
>
> . . . .
>
> . . . I mean, the meeting is over right there. Nothing, they just tell us to go back to work.

On cross-examination, there was this exchange:

> Q. MR. CARTER: During the course of the meeting, Mr. Raines [sic] did not ask employees if they had any grievances or problems, did he?
>
> A. MR. PLORK: I don't understand that.
>
> Q. MR. CARTER: We'll get at it another way. It's a fact as far as the meeting is concerned that Mr. Raines [sic] did not say to employees tell me if you have any grievances or problems.
>
> A. MR. PLORK: He never asked what our problem was.

Obviously, if the meeting lasted about 20 minutes, Plork has given us a highly truncated version of what Raine said.[131] Obviously, too, I think, everything Plork claims Raine said was legally benign, with the arguable exception of the alleged statement, ''but now that I know what your problem is, things are going to be better.'' I would not rely on Plork's sketchy account to find that this was either a ''solicitation'' of grievances, or a ''promise'' to ''remedy'' them, especially where Plork never identified what ''problem'' it was, if any, that Raine was allegedly referring to, and where Plork's concession on cross-examination seems to rule out the possibility that Raine at some earlier point had invited employees to give vent to any grievances or ''problems'' they might have. More fundamentally, I have no confidence that Plork accurately described the statement in question.[132] Thus, I found Plork's testimony about this statement to be too unreliable, prima facie, to have shifted the burden of persuasion to Stanton; and I therefore draw no inference adverse to Stanton based on its failure to present Raine, Anderson, or Gonzales, to offer their own versions of the same incident.

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paragraph), they use Khanh Nguyen's October 2 transfer to Phoenix from Stockton as an alibi, to refute Garcia's claims about grievance-solicitations made by ''Khanh'' Nguyen throughout the month of October.

[129] For reasons already noted, I find that in all instances of alleged grievance-solicitations described by Garcia involving ''Khanh'' Nguyen, Garcia was referring to the alleged actions of *Hung* Nguyen.

[130] Plork recalled that at the end of Raine's remarks, one employee asked one question: Was Khanh Nguyen [who transferred to the Phoenix plant on October 2] going to return to the Stockton plant? Anderson interjected to say that Nguyen was not coming back.

[131] On cross-examination, Plork seems to have conceded that he was not disposed to listen carefully when the Company delivered preelection campaign pitches to the employees. Thus,

> Q. MR. CARTER: Isn't it true, Mr. Plork, that when company representatives would say things against the union, or about what they were doing, you would often not listen?
>
> A. MR. PLORK: Sure.
>
> Q. MR. CARTER: The answer is sure?
>
> A. MR. PLORK: Yes.
>
> Q. MR. CARTER: That's the same as yes?
>
> A. MR. PLORK: Yes.
>
> Q. MR. CARTER: In fact, you did not always listen much in the meetings because you were against the company. Isn't that correct?
>
> A. MR. PLORK: Yes.

[132] Plork's account was not just sketchy, but confusing as to context, and uncorroborated. Moreover, it seems improbable that Raines would simply make the statement in question out of the blue, and particularly improbable that having just said, ''I can't promise you anything right now,'' he would in the next breath cancel that disavowal with the statement, ''but now that I know what your problem is, things are going to be better.''

2. Hung Nguyen's alleged repeated invitations to Garcia to voice his ''problems,'' and promises to ''take care of'' them

At the risk of making Garcia's account appear more coherent than it actually was, this, in substance, is what Garcia claims: On an uncertain date about ''three weeks before the election,'' Garcia happened to meet ''Khanh'' (i.e., Hung) Nguyen while on a forklift run in or near the upholstery department. They exchanged words, described by Garcia as follows:

> He told me that the union was no good, and I told him he's wrong. Then he went on to say if there's something you want or need, why didn't you tell me and I can make sure you get it. Then I tell him how can you do that when you're just a foreman, you know. And he went on to say, well I know people that I could go to that will make sure you get what you want. You know, and I told him how are they just going to, you know, give me what I want by telling you, because you're not the owner or plant manager. And he continued to assure me that he's positive that I would get what I want if I just tell him.
>
> . . . .
>
> JUDGE NELSON: Okay. What did you say after he explained that to you?
>
> A. I told him I don't believe him. And I just walked off.
>
> JUDGE NELSON: Okay. So that's how it ended. You said—
>
> A. Yes.

Thereafter, on as many as ''40 to 50'' occasions in the next 3 weeks, Garcia insists that he had substantially identical exchanges with ''Khanh,''[133] during a few of which Duong Pham was also standing by, and in some manner echoed ''Khanh's'' blandishments, or otherwise encouraged Garcia to confide to ''Khanh'' whatever it might be that Garcia ''wanted'' from the Company.

Hung Nguyen and Duong Pham both denied ever having a conversation with Garcia resembling the ones he described. Hung Nguyen recalled only one union-related exchange with Garcia, occurring ''a week before the election,'' when Garcia was in or near the upholstery department, and summoned Nguyen over with a crooked finger. There, says Hung Nguyen,

> He [Garcia] said to me that something about you guys are going to lose. He said I know a lot of people in here supporting the union and I collect a lot of cards from employees in here and then I just said, you don't know what you're doing Lewis.

Nguyen specifically denied having had any conversation in which he asked Garcia about ''problems'' he might have, or where he offered to ''help'' him. He also testified that he followed Anderson's instructions to supervisors not to initiate union-related conversations with employees, not to ''promise'' anything, and, specifically, to ''leave [Lewis Garcia] alone.'' Duong Pham likewise insisted that he had had only one union-related exchange with Garcia, which was many weeks before the election (''about four week, one month, five weeks about that''). There, says Pham, he and Garcia ''just kind of joke[d] around'' concerning the fact that Garcia was sporting a large number of union buttons on his work clothes.[134]

Garcia's testimony about these transactions was, as a whole, improbable, even fantastic.[135] And he was at his least impressive when delivering this melange of recollections, usually feverishly and with little regard for detail or context. By contrast, the two supervisors were more impressive in their denials. I therefore find that the General Counsel has failed to establish by a preponderance of credible evidence that any such exchanges ever occurred. I would therefore dismiss the complaint in this respect.

F. *Stanton's Alleged Ratification of a Message in an Employee-Drafted Handbill Distributed on or About October 29*

As amended at the opening of this trial, the complaint alleges at paragraph 6(g) that,

> On or about October 29, 1992, [Stanton] condoned the distribution of and adopted and ratified a flyer that im-

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[133] Summarizing the nature of these followup exchanges, Garcia stated:

> Every time I went into his department he, you know, he would just tell me that the union was no good. Or he would bring up the same subject that, you know, I could still tell him what I want. And usually, I'd just ignore him and go with my work collecting carts.

Describing the number of these followup encounters, Garcia variously said,

> * It was quite a few times from about a month before election day up to election day[;]
>
> * . . . you know, it was virtually every day[,] . . . sometimes ten times a day. Because I had to go into his department many times to collect the carts to make sure that they didn't run out of carts[;]
>
> * You know, guessing, maybe 40 or 50 times. I'm not sure exactly. It was too numerous to think about counting them.

[134] Testimony as follows:

> Q. MS. MARCOTTE: So, what was said?
>
> A. MR. PHAM: I said, how come I got this one, you got too many?
>
> Q. MS. MARCOTTE: And what did he say?
>
> A. MR. PHAM: He say, that way I beat you. I beat Stanton.
>
> Q. MS. MARCOTTE: And what did you say?
>
> A. MR. PHAM: I said, oh, that's true. We just kind of joke around.

[135] The obvious question, put to Garcia on cross-examination by Stanton's counsel, is why Hung Nguyen, joined by Duong Pham on occasion, would persist in questioning Garcia and promising to fix any problems Garcia might have, where Garcia had supposedly made it clear from the start that he ''didn't believe'' that Nguyen had any power to help him, and repeatedly ''ignored'' Nguyen thereafter. Garcia's attempt to answer this question—''I guess some people just don't give up''—though affording comic relief, was less than persuasive. If Garcia was, indeed, telling the truth about the nature and frequency of these encounters, then I could only assume that the exchanges between Nguyen and Garcia had become something like a ''running joke'' for the two men, fully understood as such by Garcia.

plied that employees would lose certain benefits if they voted for union representation.[136]

Everyone now agrees that employee Elsie Rodriguez composed a ''flyer'' by hand, at home, then had photocopies of it made at her own expense, then passed out copies of it to employees at the plant, on October 28 or 29.[137] The flyer said this:

WITH UNION
YOU LOSE
EVERY MONTH

INCENTIVE	$64.00
UNION DUES	$12.00
INSURANCE	$20.00

There is no question that if Stanton had delivered the same message to employees, or had put Rodriguez up to deliver it, Stanton would have violated Section 8(a)(1), by implying that employees would automatically lose a current benefit—''incentive'' pay—if they elected union representation. Likewise, under familiar interpretations of the Act, if Stanton in some way visible to employees ''ratified'' or ''condoned'' that message, even without having authored or inspired it, it would commit an 8(a)(1) violation. As noted above, the General Counsel now relies solely on a ''condonation'' or ''ratification'' theory of violation.

Lewis Garcia is again the sole water-carrier for the General Counsel concerning this allegation. He claims that both ''Khanh'' Nguyen and Duong Pham separately made such adoptive or ratifying statements to him on October 29, after Garcia had already become aware of ''Elsie's flyer'' being in circulation. Thus, concerning Duong Pham, Garcia testified, in a first version:

> [Duong] approached me. . . . He asked me if I'd seen what [''Elsie''][138] was passing out. . . . I responded by saying I haven't seen what [Elsie] was passing out, but several people have told me what she is passing out. . . . And then he said something to that. Then he said well you see what you're going to lose then if you continue with the union. . . . I told him I don't believe him. He said I should just quit because it's not going to do me any good. . . .
>
> JUDGE NELSON: Did he say what you were supposed to quit?
>
> A. The union activities. I told him I won't. . . . I think I just walked off then.[139]

Concerning ''Khanh'' Nguyen,[140] Garcia testified that, after his conversation with Duong Pham, he was in the ''assembly department,'' when,

> Khanh Nguyen also asked me if I had seen what Elsie was passing out. . . . And he also at that point mentioned that I still had a chance to let him know anything I may need or want. That it would still be a good time to quit my activities with the union. You know, that I'm wasting my time continuing with these union activities.

Pressed by the General Counsel, Garcia elaborated as follows:

> Q. Do you recall if he said anything else?
>
> A. No. And he also referred to the flier, because you see what you're losing if you continue with it anyway, you know.
>
> Q. Did you say anything in response to that?
>
> A. I told him that we're not going to lose anything, and that I would continue with what I believe in. And just walked off and continued with my work by then.
>
> Q. Was that the extent of your conversation?
>
> A. Yes, yes.

Both Duong Pham and Hung Nguyen denied having seen ''Elsie's flyer'' prior to the trial, and as previously noted, they each admit to having had only one union-related conversation with Garcia, neither of which resembles the October 29 events described by Garcia.

Again I note that Garcia, and Garcia alone, has supplied the critical evidence—this time, of company adoption or ratification of the message on the flyer. Again I find this suspicious, and again, Garcia's testimony, when plausibly denied by the company agents in question, is not enough to persuade me that there was such condonation or ratification. I therefore find that the General Counsel has not carried the prosecution's ultimate burden of persuasion on this point, and I will recommend dismissal of this, the final challenge made in the complaint and the Union's objections to Stanton's behavior preceding the election.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[141]

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[136] Before this amendment, par. 6(e) had charged, in addition, that Stanton had ''caused [the] flyer to be circulated.'' Explaining the amendment, counsel for the General Counsel stated,

> The basic change to that paragraph is that we're taking out that part of it that indicates that Respondent caused the flyer to be circulated. And rather it should be only that Respondent condoned the distribution of the flyer and adopted and ratified it.

[137] There is no evidence that Rodriguez violated rule 8's proscriptions, and the General Counsel disclaimed any such contention.

[138] This was rendered ''else he'' in the transcript.

[139] In a second version of the same alleged exchange, Garcia testified (added emphasis on revisions in testimony):

> When [Duong] approached me, he asked me if I had seen the flier that Elsie was passing around. And I told him *I've seen the fliers, because I have a few of them*. You know, he also asked me if I'd seen Elsie passing them around. And I told him no, but I heard about Elsie passing them around. And he goes *well you see what else you're going to lose if you keep going with this union stuff*.

[140] Here, contrary to counsel for the General Counsel's assertion (Br. p. 37), it is not at all obvious that Garcia was referring to Hung Nguyen; Garcia did not otherwise identify the individual he was describing. Thus, there is no way of knowing whether in this instance he had in mind Khanh Nguyen, the plant manager, or Hung Nguyen, the department supervisor. If he meant to refer in this instance to the ''real'' Khanh Nguyen, his testimony may be rejected because Khanh Nguyen had an alibi—he had been in Phoenix since October 2. If Garcia meant Hung Nguyen, however, my remaining comments and findings below are appropriate.

[141] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

1. The complaint in the consolidated unfair labor practice cases is dismissed in its entirety.

2. The objections to the representation election are overruled; the results are certified; the IUE did not receive a majority of the valid ballots cast.